

Ethical Considerations about Getting Paid

DISCIPLINARY COMMISSION
OPINION #2-23

Question

What ethical obligations do lawyers have regarding fee agreements, refunds, and fee disputes? Specifically, when is a fee agreement reasonable; when must a lawyer refund fees; and what must a lawyer do with funds when there is a fee dispute?

Short Answer

The Indiana Rules of Professional Conduct list various factors for lawyers to consider when drafting fee agreements and negotiating payments from clients. Lawyers should avoid provisions in their fee agreements that are confusing and unenforceable. Lawyers have a duty to refund unearned fees when a representation ends prematurely and should retain any disputed portion of fees in their trust accounts. Clear communication with the client about how fees will be and have been earned can significantly mitigate fee disputes.

Recommended Rules for Review

Indiana Rules of Professional Conduct: [1.5](#), [1.15](#), [1.16](#).

[Indiana Admission and Discipline Rule 23, §29](#).

Summary

Due to the fiduciary relationship between lawyers and their clients, lawyer fee agreements are not typical contracts. The Rules of Professional Conduct require lawyers to be fair and transparent in dealing with clients, which dictates that lawyer fee agreements be fair to the client and that the basis for the fee be clearly communicated to the client. These fiduciary obligations extend beyond the end of the attorney-client relationship. [Indiana Professional Conduct Rule 1.16\(d\)](#) requires lawyers to refund any advance payment of fees or expenses that have not been earned by the lawyer when the representation is terminated for any reason.

The following general rules should be considered:

1. Nonrefundable fee provisions are generally prohibited, as they are unfair to and unenforceable against clients. As such, they should almost never be used and certainly should not be part of any regular fee agreement used by a lawyer.
2. Funds that are not the lawyer's should be immediately placed in a trust account.
3. Except for nominal amounts, funds that do belong to the lawyer do not belong in the trust account.
4. Disputed funds should remain in the trust account¹ until disputes are resolved. This includes disputes between the lawyer and client over fees.
5. Disputes about whether a lawyer's fees are "reasonable" should be considered on a case-by-case basis and analyzed under [Indiana Professional Conduct Rule 1.5\(a\)](#). When creating a fee agreement for a client, a lawyer must consider the factors listed in [Rule 1.5\(a\)](#) to determine whether the fee is reasonable.
6. If it is impossible to discern from the plain text of a written fee agreement how the ultimate fee will be calculated, then the fee is inherently unfair to clients.
7. The Commission encourages the continuation (if possible) of an attorney-client relationship after a grievance is filed, but a lawyer should never pass the costs of defense to grievances on to the client nor should any quid pro quo be offered to withdraw a grievance.

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Non-Refundable Fee Clauses

Hypothetical #1: Lawyer A is hired to represent Client B in complex litigation for a flat fee of \$10,000. Client B accepts and enters into a written agreement with Lawyer A. The agreement contains a clause that states the \$10,000 retainer is "nonrefundable." Several months into the representation Client B becomes dissatisfied with Lawyer A's representation, seeks termination of the attorney-client relationship, and requests a refund of unearned fees. At the time of termination, Lawyer A had only provided \$5,000 worth of services. Despite this, Lawyer A contends that the retainer fee was nonrefundable and refuses to refund Client B any unearned funds.

¹ See [Ind. Admission and Discipline Rule 23, §29](#), which details the methods of recordkeeping and accounting necessary for maintenance of a trust account.

Lawyer A violated [Indiana Professional Conduct Rule 1.16\(d\)](#) by failing to promptly refund the unearned \$5,000 in fees to Client B. In addition, Lawyer A violated [Rule 1.5\(a\)](#) by making an agreement for and charging a nonrefundable flat fee. See [Matter of O'Farrell, 942 N.E.2d 799, 806 \(Ind. 2011\)](#) (nonrefundable clauses in fee agreements are generally not enforceable). Under [Rule 1.5\(a\)](#), Lawyer A should refrain from using a nonrefundable provision in Lawyer A's fee agreements because such clauses are unenforceable and are not consistent with the fiduciary duty Lawyer A owes to clients.

Ethical Minefield #2 – Fee Disputes

Hypothetical #2: Lawyer A represents Client B in a civil litigation case that was settled, with the client's approval, for \$15,000 in favor of Client B. Lawyer A receives the settlement check in that amount from the defendant and deposits the check in Lawyer A's Client Trust Account. Lawyer A promptly notifies Client B and sends the client a bill for \$4,000 in legal fees. Client B disputes the amount earned in legal fees and claims that he is only willing to pay Lawyer A \$2,000 for his services. Lawyer A does not agree and sends Client B a check for \$11,000 and transfers \$4,000 to Lawyer A's Operating Account.

Lawyer A has violated [Indiana Professional Conduct Rule 1.15\(e\)](#) by transferring disputed funds into his Operating Account. Lawyer A correctly sent Client B the \$11,000 check representing the amount that clearly belongs to the client. However, by moving all \$4,000 of the remaining funds into his operating account, Lawyer A has converted the \$2,000 in dispute. Instead, Lawyer A should have transferred the \$2,000 undisputed funds to his operating account (as leaving that amount in trust would be commingling) and left the remaining \$2,000 in trust until the dispute was resolved.

Ethical Minefield #3 – Excessive Fees and “Reasonableness”

Hypothetical #3: Lawyer A is a newly admitted attorney. Lawyer A wishes to become a solo practitioner in City X, practicing in complex business bankruptcy. Lawyer A has no experience in this area and knows that he will have to spend many hours getting to a point in which Lawyer A can be an effective advocate for clients. Lawyer A does not consult any authority (e.g., Bar Association or an experienced attorney) but decides to charge clients at an hourly rate similar to the rate charged by experienced attorneys in City X.

Disputes involving whether a lawyer's fees are "reasonable" should be considered on a case-by-case basis and should be analyzed under [Indiana Professional Conduct Rule 1.5\(a\)](#). When creating a fee agreement for a client, a lawyer must consider the factors listed in [Rule 1.5\(a\)](#) to determine whether the fee is reasonable and ethical.

Whether a fee is excessive, as negotiated or collected, is a nuanced analysis and includes consideration of several factors that are enumerated in [Indiana Rule of Professional Conduct 1.5](#). However, given the facts as outlined above, and provided Lawyer A has not communicated his lack of experience to his clients, it is likely that Lawyer A has set an hourly rate at a level that could be found as unreasonable. While other attorneys in City X might charge comparable rates for this type of representation, Lawyer A is a new attorney with no experience. The number of hours that Lawyer A will need to spend to gain competence in the subject matter will make the overall fee unreasonable if Attorney A attempts to collect the entire amount from clients. [Indiana Professional Conduct Rule 1.5](#) prohibits both the making of an agreement for an unreasonable fee and the collection of an unreasonable fee.

If the facts are changed so that Attorney A is newly admitted but worked as a paralegal for a number of years before going to law school for an attorney who handled complex business bankruptcies, the analysis would be different. It is possible that Attorney A in this instance is equally competent to other practitioners in the area who are charging similar fees for the nature of the work. It would depend on how much practical experience in the subject matter and guidance Attorney A gained while working as a paralegal for the more experienced attorney.

Ethical Minefield # 4 – Commingling of Funds

Hypothetical #4: Client B hires Lawyer A to represent her in a criminal arson case. Client B paid Lawyer A two checks, one for the flat fee representation and one to retain a burn pattern expert. Expecting that payment would be made to the expert soon, Lawyer A put both checks into the firm's operating account. Shortly thereafter, the law firm declared bankruptcy. Client B sought termination of representation and a refund of fees. Due to the bankruptcy, Lawyer A was unable to refund any unearned fees, or the monies given to retain an expert.

Attorneys are able to treat payments for flat fee representation as earned upon receipt. See [Matter of Kendall, 804 N.E.2d 1152, 1158 \(Ind. 2004\)](#) (holding that flat fees may be placed in the lawyer's operating account). Therefore, Lawyer A was not in violation of [Rule 1.5](#) by placing the flat fee check into the operating account. However, pursuant to [Rule 1.16\(d\)](#), the firm has a duty

to refund any fees that are unearned at the time of termination. As such, the client will be treated as a creditor of the firm.

By placing the second check for the burn pattern expert into the law firm's operating account, Attorney A has violated [Rule 1.15\(a\)](#), which requires lawyers to keep others' property separate from their own. Here, Lawyer A should have immediately deposited Client B's check meant to retain an expert into Lawyer A's Client Trust Account for safekeeping until the expert was retained. By putting the check into the operating account, Lawyer A commingled funds. As a result, Client B's funds were included in the bankruptcy estate of Lawyer A's law firm.

Ethical Minefield #5 – Inherently Unfair Fee Agreements

Hypothetical #5: Client B consults with Lawyer A for a criminal matter. Lawyer A's agreement explains that the fee for the case is a flat \$20,000. However, Lawyer A then explains to Client B that the lawyer will be keeping track of hours and, to the extent that the lawyer has earned the entire flat fee, Lawyer A will invoice Client B for the additional fees. Lawyer A then negotiates a plea agreement with prosecutors and advises Client B to take the plea offer, as Lawyer A has nearly earned all the flat fee, based on a rate of \$500 an hour, and he now will begin to invoice Client B for additional fees.

Lawyer A has violated [Rule 1.5\(b\)](#) because Lawyer A did not communicate the hourly rate at which the lawyer would be tracking hours. Moreover, Lawyer A mischaracterized the fee in the initial agreement. A flat fee is meant to be a fixed payment for a particular matter or a specific part thereof. By removing the certainty of that fixed payment from the fee agreement, Lawyer A is creating an unfair and unreasonable contract.

If the facts are changed so that the fee agreement provides \$20,000 for all work up to a trial, upon which a second flat fee of \$5,000 would be owed, this provision is a fair agreement that spells out exactly what additional funds Client B would need to pay if the client decides to resolve the case by trial.

Ethical Minefield #6 – Charging for Preparation of a Response to Grievance

Hypothetical #6: Client B retains Lawyer A on an hourly fee basis for representation in a dissolution of marriage. While working on the dissolution, several issues arise between Lawyer A and Client B. Client B files a grievance

with the Indiana Supreme Court Disciplinary Commission alleging several ethical violations. Lawyer A receives a demand for a response from the Commission. Lawyer A continues to represent Client B in the dissolution case. Lawyer A spends 2 hours preparing a response to the Commission and then bills Client B for the 2 hours that he spent writing the response. Lawyer A also charges Client B for a telephone call during which Lawyer A threatened to withdraw from the dissolution case if Client B did not withdraw the grievance.

[Indiana Professional Conduct Rule 1.5\(a\)](#) prohibits a lawyer from charging a client an unreasonable fee. Billing a client for a lawyer's grievance defense or any conversation strictly related to the grievance is an unreasonable fee. It is inappropriate because these are not services expected by the client and do not benefit the client's case.

Here, Lawyer A is permitted to continue representing Client B, unless the filing of the grievance would affect the lawyer's ability to represent the client. Should Client B terminate Lawyer A's representation, Lawyer A may bill the client for any time Lawyer A may spend preparing to withdrawal from the client's case, but Lawyer A may not bill a client for time spent preparing a defense against Client B's grievance.

Conclusion

Lawyers are fiduciaries and have a duty to protect their prospective clients when negotiating a fee agreement. In addition, these fiduciary duties require lawyers to protect their clients' interests when there are fee disputes between lawyers and their clients. Further, lawyers should avoid nonrefundable provision clauses in their fee agreements. Finally, lawyers should maintain a trust account to separate disputed funds (funds belonging to clients and third parties) from the lawyers' funds to limit the commingling of funds and potential harm to clients.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.