Your Engagement Agreement as a Defense Against Fee Disputes

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When lecturing on legal malpractice avoidance, we often caution attorneys to think carefully before suing a client for fees. The majority of lawsuits in which a lawyer sues his client for unpaid fees result in a counterclaim being filed against the lawyer for legal malpractice. Even without a lawsuit for fees, we see clients preemptively suing for legal malpractice when they get behind on fees. You don't have to sue your client to face a problem with your fee, however. Fee disputes are a leading cause of independent legal malpractice claims, disciplinary complaints, and complaints made with the Pennsylvania Lawyers Fund for Client Security. The best way to protect yourself against such claims starts at the beginning of the representation, with your engagement agreement.

Pennsylvania Rule of Professional Conduct 1.5(b) provides that a lawyer must communicate the basis or rate of the fee to the client, in writing, before or within a reasonable time after commencing the representation. Pa. R.C.P. 1.5(b). This is true in all cases unless the lawyer regularly represents the client. Pa. R.C.P. 1.5(b). It is a best practice to put your fee in writing in all cases, however, even for regular clients. If there is a long-term, ongoing relationship the fee can be communicated in something less formal than a formal engagement agreement, but the writing should refer back to the existing engagement agreement and it should clearly detail the client to be represented, the matter in which the representation is to be provided, the scope of the representation, and the fee to be charged. Moreover, contingent fees must always be communicated in writing. Pa. R.C.P. 1.5(c).

A good fee agreement will outline the fees and expenses to be paid by the client, and it will specify the method of calculating the fees and costs. See PBA Formal Opinion 2025-100. Further, it will explain the format of billing statements and how often bills will be sent, as well as payment deadlines and options, including penalties for late payments. With respect to costs, the fee agreement should identify expected costs that will be covered by the client, such as filing fees, administrative services or expert witness retention. The fee agreement should provide for any retainer and explain if and

when the retainer is required to be replenished. One of the best ways to avoid a future fee dispute is to include an evergreen retainer in your engagement agreement and, most importantly, to ensure that your client actually does replenish the retainer. If known, the fee agreement can explain what services will be provided within the initial retainer. If the attorney applies any minimum amount of time to certain services, such as telephone calls or emails, that should be explained as well. Finally, the fee agreement should identify if there are any services which are not included in the engagement such as, for example, representing the client in an appeal.

It is not enough, though, just to communicate the fee in writing. A lawyer must also charge a fee that is not "illegal" or "clearly excessive." See Pa. R.C.P. 1.5(a). Many factors are considered when determining if a fee is appropriate: "whether the fee is fixed or contingent; the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and the experience, reputation, and ability of the lawyer or lawyers performing the services." See Pa. R.C.P. 1.5(a).

This means that, even if the client agrees to pay the fee in writing, the lawyer could face disciplinary consequences or litigation if the fee is nonetheless excessive. We see this arise most often in cases where the attorney withdraws at some point in the representation, and there is either a flat fee or a non-refundable retainer which the client has already paid, or the client has paid for services which the client deems to have been incomplete at the time of the withdrawal. Again, a clear written engagement agreement can offset the risk of some of these claims. However, as will be discussed below, the attorney is the best defense against such claims, and lawyers should be careful to evaluate the reasonableness of their fees when representation concludes (and always).

Nonrefundable retainers are permissible under the Rules of Professional Conduct when they are "confirmed by the clear and unambiguous language of a written statement provided to the client or a written agreement between the attorney and the client." See PBA and Phila. Bar Assoc. Joint Formal Opinion 2022-300 (citing PBA Formal Opinion 1995-100). Retainer payments, even when nonrefundable, must be deposited in the attorney's escrow account unless there is a written statement to the client or a written agreement with the client that the attorney will deposit the retainer elsewhere. It is important for attorneys to understand the difference between a flat fee engagement and an engagement involving a nonrefundable retainer which is earned upon receipt. A flat fee engagement does not mean the lawyer earns the moneys upon receipt or that the fee is not required to be refunded if it is ultimately not earned. An attorney may only deposit the fee into his operating account when it is disclosed to the client that the fee is both "nonrefundable" and "earned upon receipt," (citing *ODC v. Ostrowski*, 135 DB 2009 (attorney should

not have deposited "flat fee" into his operating account because it was not disclosed to the client that the fee was nonrefundable and earned upon receipt)).

Moreover, attorneys should be cognizant that even when appropriate disclosures are made, the fee must not be excessive under Pennsylvania Rule of Professional Conduct 1.5(a). A nonrefundable fee earned upon receipt must correlate with the work to be performed, taking into consideration the factors under Rule 1.5(a). Thus, when an engagement concludes, the lawyer should carefully consider whether any portion of the fee should be refunded, regardless of whether the fee was communicated to be nonrefundable. The factors identified in Rule 1.5(a) can inform the lawyer in evaluating the reasonableness of the fee.

For example, an attorney who charges a nonrefundable fee earned upon receipt and then is terminated from the representation or withdraws before any work is performed may be required to return all or a portion of the fee. Failure to do so can give rise to inquiry by the Pennsylvania Lawyers Fund for Client Security or disciplinary action for potential violations of Rule 1.5. Notably, a client who files a complaint with the Pennsylvania Lawyers Fund for Client Security is asked whether a disciplinary complaint has been filed and is directed to file one in many cases. This leaves lawyers defending their fees on two fronts. It is best to resolve the fee dispute with your client before the matter reaches this point.

In sum, attorneys should always use their engagement agreement to thoroughly and accurately explain their fees. Regardless of the adequacy of the explanation, however, lawyers should carefully consider the reasonableness of the fee and ensure compliance with Rule 1.5 throughout the engagement and upon termination.

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