



**ILLINOIS STATE
BAR ASSOCIATION**

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February 21, 2018

Bailey E. Felts
Associate Counsel

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street
13th Floor
Chicago, IL. 60601

Re: ISBA Proposal to Amend Comments to Illinois Rules of Professional Conduct
1.5, 1.15, 5.4, 7.2.

Dear Committee Secretary:

On behalf of its more than 28,000 lawyer members, the Illinois State Bar Association ("ISBA") respectfully submits to the Supreme Court Rules Committee a proposal to amend several Comments to the Illinois Rules of Professional Conduct related to lead generation. The proposed amendments are attached. The ISBA urges the Committee to review the amendments and recommend their adoption to the Court.

Over the past several years there has been an explosion of Internet based for-profit businesses offering to match consumers looking for legal services with lawyers. In terms of lawyer professional regulation, these Internet matching services are a form of "lead generation." Under 2016 amendments to the Illinois Rules of Professional Conduct, Illinois lawyers are permitted to pay nonlawyers for client leads under certain circumstances. However, lead generation business models can vary widely and many of these models may include features that appear to violate longstanding lawyer professional obligations. The purpose of the attached ISBA proposal is to provide additional guidance to Illinois lawyers when they are considering participating in a lead generation service.

The ISBA proposal does not seek to amend any current Rule of Professional Conduct. It only proposes amending several Comments to the Rules. The ISBA believes the current Rules provide a sufficient framework for lawyer participation in lead generation services. Nevertheless, the ISBA's proposed amendments seek to add some practical guidance to lawyers in an effort to help them evaluate participation in lead generation services in light of their professional obligations. The proposal is designed to ensure a lawyer's professional

independence while providing maximum protection to clients and legal services consumers. The proposal involves four areas: fee sharing; client funds; fee disclosures; and dealing with prospective clients. The ISBA's proposed amendments are:

1. ***Fee Sharing*** (IRPC 5.4, Comment [1] and 7.2, Comments [5] and [6]).

Ill. S. Ct. Rule of Prof. Cond. 5.4(a) prohibits lawyers from sharing fees with nonlawyers. Comment [1] to that Rule notes that it expresses "the traditional limitations on sharing fees." Those traditional limitations are designed to help ensure a lawyer's independent professional judgment but also to protect legal consumers. As expressed by the Illinois Supreme Court in *O'Hara v. Ahlgren, Blumerfeld & Kempster*, 127 Ill. 2d 333 (1989), fee sharing between lawyers and nonlawyers is contrary to good public policy. In *O'Hara*, the harms of fee sharing were identified as: (1) the possibility of nonlawyer control over cases and legal services; (2) the promotion of solicitation; (3) the facilitation of the unauthorized practice of law; (4) referrals (or in this case, matches) motivated by profit rather than the legal welfare of the person in need of legal services; and (5) a risk that lawyers might devote less time to cases where they have to share a fee with a nonlawyer (and therefore create a risk of client prejudice). Another concern, as expressed in the Restatement Third, The Law Governing Lawyers, Section 10, is that permitting fee sharing arrangements that have the potential of influencing or directing lawyer judgment may, in turn, induce participating lawyers to violate their professional obligations.

While the ISBA has not catalogued all the types of fee arrangements between participating lawyers and lead generators, it appears that some lead generation services calculate their fee directly as a percentage of the participating lawyer's fee to the client. This type of arrangement has been widely and recently criticized by other bars.¹

While the ISBA recognizes that not all of the harms identified in *O'Hara* may be at issue with many of today's lead generation services, in light of the seriousness of those harms the ISBA believes the prohibition on fee sharing is important to preserve. The ISBA's proposed amendments to Comment [1] of IRPC 5.4 and Comments [5] and [6] to IRPC 7.2 are intended to do that. The proposed amendments seek expressly to prohibit lead generation compensation models that are: (1) directly based upon a percentage of the legal fee charged a client or (2) owed solely if a client uses the lawyer identified by the lead generator.² Nevertheless, the ISBA

¹ Utah Ethics Opinion 17-05 (September 27, 2017); New Jersey ACPE Joint Opinion 732, CAA Joint Opinion 44, and UPL Joint Opinion 54 (June 21, 2017); Pennsylvania Formal Opinion 2016-200 (September, 2016); South Carolina Ethics Advisory Opinion 16-06 (July 14, 2016); and Ohio Professional Conduct Opinion 2016-03 (June 3, 2016). See also, Virginia proposed Legal Ethics Opinion 1885 (October 31, 2017) and New York State Bar Ethics Opinion 1132 (August 8, 2017).

² Aside from the more recent authority noted in footnote 1 above, many bar associations have issued guidance prohibiting payment of fees to nonlawyer marketers or advertisers that are contingent on work or income received. Other forms of payment, especially those that are contingent upon the receipt of work by a lawyer seem most often prohibited. In the 2012 Report accompanying its proposals to the ABA House of Delegates, the ABA's Ethics 20/20 Commission noted:

"The reference [in Model Rule 7.2, Comment [5]'s definition of lead generator] to Model Rule 5.4 is intended to remind lawyers that, although the lawyer can pay a fee to a nonlawyer for a client

proposal acknowledges that fees for lead generation which reflect reasonable advertising costs are not prohibited. A fee based on a subscription model or payable without regard to clients served or income received are generally acceptable and would not be prohibited under the ISBA proposal.³

The proposed ISBA amendments merely seek to preserve traditional prohibitions on fee sharing and are consistent with existing professional responsibility authority.

2. Handling Client Funds (IRPC 1.15, Comment [3E]).

Ill. S. Ct. Rule of Prof. Cond. 1.15 sets out detailed lawyer obligations concerning handling client funds. The hallmarks of this Rule are lawyer control of the funds and, as a significant measure of client protection, the proper segregation of funds into separate business and client accounts at regulated financial institutions. The deposit of client funds into interest bearing accounts for the benefit of the Lawyers Trust Fund of Illinois is a significant feature of the Rule.

It appears that many for-profit lead generation services require legal consumers to pay the advertised legal fee to the lead generator prior to the completion of the legal services. The legal fee is held by the lead generator throughout the representation and until the legal service is deemed completed. At the time of completion, the legal fee (often after subtracting the lead generator's fee) is released to the participating lawyer.

This is a significant issue. Allowing a lead generator to hold client funds during the course of a legal representation without substantial regulatory safeguards, such as lawyer control over the funds and prohibitions on comingling, is problematic. However, whether this type of fee holding arrangement is appropriate in Illinois is unclear. The validity of the arrangement is

lead, the fee should typically not be contingent on a person's use of the lawyer's service. Such a fee would constitute an impermissible sharing of fees with nonlawyers under Model Rule 5.4(a)."

Many state bars take the same approach. See Utah Op. 14-02 (payment to nonlawyer marketer based upon a percentage of fees paid to the lawyer is improper); Michigan RI-365 (2013)(marketing program impermissible where lawyer pays a fee tied specifically to referrals made); Arizona Ethics Opinion 11-02 (while approving a pay-per-click fee arrangement, it specifically prohibited fees "based on the amount of fees ultimately paid by clients who actually engage the lawyer."); Oregon Op 2007-180("Oregon RPC 5.4 thus precludes a lawyer from paying someone, or a related third party, who advertises or otherwise disseminates information about the lawyer's services based on the number of referrals, retained by clients, or revenue generated from the advertisements."); Kentucky Bar Association E429 (2008)("Also problematic is the compensation system that is tied to the fee that is earned in a referred case."); and, Texas Bar Association 573 (2006)(Finding improper a lawyer's participation in a web service that receives compensation from potential clients or lawyers based on retention, legal fees paid, or results obtained by a lawyer.).

³ Certain methods of payment for lead generation seem to be generally accepted. These include set annual or monthly fees and "pay-per-click" fees. See Utah Op. 15-05 (paying a nominal amount (\$3.00 to \$5.00) per bid opportunity regardless of whether it results in any work is not improper); Washington Advisory Op. 2014-01 (a flat fee, monthly fee, or pay-per-click fee is appropriate); Arizona Op. 11-02 (pay-per-click participation fee constitutes a reasonable cost of advertisements); NJ Op. 43 (2011)("attorneys are not flatly prohibited from paying "per lead" Internet advertising charges); Kentucky Bar Association E429 (2008)"Charging based on 'hits' is merely a method of calculating viewership."); and Oregon Opinion 2007-180 ("paying a fixed annual or other set periodic fee not related to any particular work derived from a directory listing violates neither RPC 5.4 nor RPC 7.2(a)).

impacted significantly by how the funds are characterized. Are the client funds a flat fee which the lawyer has earned upon payment and are now the lawyer's funds merely being held by the lead generator? Or, are the funds held by the lead generator a security retainer, i.e. not earned by the lawyer until the legal services are completed? The answer to this question defines the responsibility owed by the lawyer as well as the propriety of participating with any given lead generator.

Given the lack of clear authority on this issue, the ISBA's proposed new Comment [3E] to Rule 1.15 identifies a lawyer's longstanding obligations with respect to handling and protecting client funds. Those obligations are to ensure separateness, accountability, identifiability, and be subject to refund at the lawyer's direction. With these obligations reinforced, lawyers must then determine whether participation in any given lead generation service is compatible with their obligations.

This proposed new Comment elicited some debate within the bar on whether a bright line rule would be preferable. Certainly, a bright line rule would provide the clearest guidance. However, in the absence of such a bright line rule, the ISBA believes proposed new Comment 3[E] allows flexibility for lawyers in evaluating whether any given fee handling arrangement complies with existing requirements.

3. *Disclosure of Fees, Costs and Other Expenses* (IRPC 1.5, Comment [2]).

Ill. S. Ct. Rule of Prof. Cond. 1.5 provides, in part, that all lawyer fees must be reasonable. It also requires a lawyer to make sure that a client understands the basis and rate of all charged fees and expenses. Ill. S. Ct. Rule of Prof. Cond. 1.5(b).

Some lead generation services establish fees for specific legal services that participating lawyers may charge. The language used by lead generation services in conveying fee information to legal consumers may vary. Notwithstanding a lead generator's advertisement of a specific legal fee, a participating lawyer remains obliged to make sure the client fully understands the fee, costs, and expenses associated with the representation.

The ISBA's proposed amendment to IRPC 1.5, Comment [2] is intended to reinforce the applicability of the obligations with respect to fees and expenses, even when fees are advertised by lead generators. This proposal will bring attention to the lawyer's ongoing obligation to make sure his or her client understands the fee, costs, and expenses arrangements of any lawyer-client relationship formed via a lead generation service.

4. *Prospective Clients* (IRPC 1.18, Comment [2]).

Ill. S. Ct. Rule of Prof. Cond. 1.18 regulates a lawyer's duties to prospective clients. The Rule governs those situations where a prospective client "consults" with a lawyer but no representation goes forward. If a consultation has occurred between a prospective client and lawyer, the lawyer (and lawyer's law firm) will owe certain obligations to that prospective client. In determining whether a consultation has occurred, one factor is whether the prospective client was warned or cautioned about unilaterally providing too much information to the lawyer.

A common feature of many lead generation services allows a prospective client to provide information unilaterally to the lawyer without the ability of the lawyer to stop the flow of information. This unilateral provision of information makes it difficult for a lawyer to avoid the duties imposed under Rule 1.18 and the formation of an attorney-client relationship.

While Ill. S. Ct. Rule 1.18 already references its applicability to all lawyer communications including electronic communications and advertisements in any medium, because the consequences of having a lead generation service invite a consumer to send information to a participating lawyer may be significant, the ISBA felt additional emphasis addressing lead generation was warranted.

In closing, despite the critical evaluation of certain lead generation services, Illinois lawyers participate in them and may view them as an important means to reach consumers in need of legal services. And, while many lawyers have raised concerns about these for-profit businesses being consistent with good consumer protection and the ideals of the legal profession, the ISBA is aware of no Illinois disciplinary actions having been taken against participating lawyers. In the absence of clear rules and guidance from the court, these services, which range from simple directories to those that imply they can provide legal services, are unregulated in Illinois. The attached ISBA proposal does not seek to regulate these lead generation businesses, but is directed at lawyer conduct. As such, the proposal may be viewed as limited and not a universal solution to the broad changes affecting the legal marketplace. Nevertheless, direct regulation of lead generation businesses in order to protect consumers, provide for a healthy legal profession, and maintain an efficient administration of justice may be warranted. By this proposal, the ISBA seeks to strike a reasonable balance between consumer interests in using new avenues of finding and employing lawyers and preserving core and well-reasoned elements of lawyers' professional responsibility to clients, tribunals, and the administration of justice.

In accordance with S. Ct. Rule 3(d) and Administrative Order MR No. 10549, the ISBA requests that the suggested revisions be forwarded to the Rules Committee or other appropriate committee for review and appropriate action.

The ISBA appreciates the opportunity to submit this proposal. If you require any additional information about the proposal, please do not hesitate to contact me.

Very truly yours,



Charles J. Northrup
General Counsel

enclosures

Cc: Jan Zekich (via email)

Lead Generation Proposal (2017)

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, or for pay generates client leads or advertises the lawyer's services, those ~~arrangements~~ does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Adopted July 1, 2009, effective January 1, 2010. ~~2017~~ ~~2017~~ ~~2017~~

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(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 costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;
- (3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a 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 agreement is not exclusive, and
- (ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability, names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly

persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (~~division of fees~~) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 5.4, a lawyer may only pay a lead generator a fee that is reasonable in comparison to other types of similar advertising. A lead generation fee may not be contingent on a person's use of a lawyer's services or calculated as a percentage of a legal fee earned. To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers; Rule 8.4(a) for the duty to avoid violating the Rules through the acts of another.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any not-for-profit organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service, even if calculated as a percentage of a fee earned.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are

compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016; [amended](#)
[, 2017, eff. , 2017.](#)

Lead Generation Proposal (2017)

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph (j)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of \$100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).

(c) for accounts with balances of \$100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least \$250 million.

(4) As an alternative to the account options in paragraph (f)(3), the financial institution may pay a "safe harbor" yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.

(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph (j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.

(j) Definitions

(1) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

(2) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.

(3) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.

(4) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(5) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(6) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(7) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(8) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(9) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding \$5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the

obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.

3[E]. Nonlawyer entities such as lead generation or referral services may from time to time hold consumer funds to be used to pay lawyer fees related to their lead generation or referral services. These Rules of Professional Conduct do not authorize or approve such business practices nor do they regulate nonlawyer businesses. Lawyers are cautioned however that such business practices do not alter or diminish lawyers' duties with respect to safeguarding the funds and property of clients or third persons. Those duties are non-delegable. Among other duties expressed in these Rules, they include, but are not limited to, ensuring that client funds remain separate from the funds of the lawyer, are accountable, identifiable, and subject to refund at the direction of the lawyer. Lawyers must also consider whether funds are held in an appropriate account, such as a business, client trust, or IOLTA account. Prior to participating in any lead generation or referral service, it is the lawyer's responsibility to carefully review the entity's business practices and ensure that those practices are consistent with the lawyer's ethical duties.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Paragraphs (a), (f) and (g) requires that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph (j)(2) and provides that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).

[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft

notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.

The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyer Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.

Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but have not been claimed—should be handled according to applicable statutes including the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025 et seq.).

[9] Paragraph (j) provides definitions that pertain specifically to Rule 1.15. Paragraph (1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).

[10] Paragraph (k) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015; amended 2017, eff. 2017.

Lead Generation Proposal (2017)

RULE 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) 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, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(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 paragraph (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:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

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

- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Adopted July 1, 2009, effective January 1, 2010.

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. [This includes relationships where a fee has been advertised by the lawyer or a lead generator or other third party on behalf of the lawyer.](#) 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 Comments [3B] through [3D] to Rule 1.15 and 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 postjudgment 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, or referral of a matter where appropriate, and 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, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial 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 financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Stormont*, 203 Ill. 2d 378 (2002). 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, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by law or rule, 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.

Adopted July 1, 2009, effective January 1, 2010

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are prospective clients. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, including through Internet-based lead generation or referral services, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates

information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client.” Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Reserved.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer’s duties when a prospective client entrusts valuables or papers to the lawyer’s care, see Rule 1.15.