

BPR ETHICS WORKSHOP

- **Wade Davies**
- Ritchie, Davies, Johnson & Stovall, P.C.
- November 3, 2023
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TOPICS

1. Fees – Clear Communication/ABA

2. Duties to Potential Clients

3. Rules on Represented Parties Protect Clients

New ABA Ethics Opinion 505

Would Require Drastic
Change for Many
Practitioners

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 May 3, 2023

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee “nonrefundable” before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer’s obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.¹ In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, “nonrefundable.” The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer’s later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

ABA Discusses Terminology

- “advance fee,” an “advanced fee,” an “advance fee payment,” an “advance fee deposit,” a “fee advance,” or simply an “advance.” Advances are also sometimes called “special retainers,” “security retainers,” or simply “prepaid fees.”
- Retainer; general retainer
- If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term “flat fee” or “fixed fee” does not transform the arrangement into a fee that is “earned when paid.” “Flat” or “fixed” does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.
- The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as “nonrefundable” and/or “earned upon receipt.”

ABA INSULTS TENNESSEE RULE

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or "earned on receipt" or some other variation on this theme.²³ This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.

ABA “Hypothetical”

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: “Client shall pay Lawyer the sum of \$15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved.” Client signed the agreement and paid the full \$15,000. Lawyer deposited the \$15,000 into his firm’s operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

CONCLUSION

- ABA Basically Says All Representation Has to Be Hourly

THE REAL RULE

Tennessee RPC 1.5(f)
specifically acknowledges
“nonrefundable” fees

Commentary [4]: “The
obligation to return any
portion of a fee does not
apply, however, if the lawyer
charges a reasonable
nonrefundable fee.”

MUST BE REASONABLE

Comment [4a]

No contingent fees
in criminal cases.
RPC 1.5(d)(2)

Reasonable Fees?

08/28/2022	Nathaniel P. Graham	12.50	4,062.50	review repository as requested by A. Goodman. Saved correspondence; handled print requests; updated witness files; updated production logs; cite checked draft opposition; compiled binder materials; per associate team. Coverage, per C. Lee.
08/28/2022	Andrew J. Alstodt	8.50	2,762.50	Witness files Discovery Folder updates, P&C QC Project, Docket Review, [REDACTED]
08/28/2022	Demirkan Coker	8.00	2,600.00	[REDACTED]
08/28/2022	Carolyn T. Vaca	7.50	2,437.50	[REDACTED]
08/28/2022	Chastine E.C. Schmidt	9.10	5,915.00	Production review Kobre; defensive deposition sheets; offensive deposition strategy matters; amendment; response re same; letter re same; production review; Egon
08/29/2022	William D. Savitt	14.00	25,900.00	prep for Corey Faibish; team & client mtgs & calls; travel to TO
08/29/2022	Benjamin M. Roth	6.00	9,900.00	
08/29/2022	Sarah K. Eddy	15.50	24,800.00	
08/29/2022	Bradley R. Wilson	14.70	23,520.00	

Complaint Exhibit

Wachtell, Lipton, Rosen & Katz

STRICTLY CONFIDENTIAL

Twitter, Inc. - Litigation Preparation Time Detail Thru 8/31/2022

Date	Name	Hours	Amount	Description
08/29/2022	Ryan A. McLeod	16.47	24,705.00	revise motion for protective order; team meetings; prepare for depositions; travel to CA
08/29/2022	Anitha Reddy	9.00	13,500.00	legal research/brief drafting/discovery review
08/29/2022	Noah B. Yavitz	12.80	16,960.00	various litigation workstreams
08/29/2022	Leo E. Strine, Jr.	2.00	4,000.00	Communications regarding expert report; potential new issues in case.
08/29/2022	Adam M. Gogolak	15.00	21,000.00	eDiscovery communications and coordination
08/29/2022	Claudia T. Morgan	13.14	14,454.00	attention to discovery
08/29/2022	Adam L. Goodman	20.00	25,000.00	Offensive discovery, deposition prep, document review, calls and meetings re defendants' productions, meet and confers, review new filings
08/29/2022	David E. Kirk	15.40	18,095.00	Defensive discovery; motion practice.
08/29/2022	Nathaniel D. Cullerton	14.80	18,500.00	Conti binder; reviewing docs
08/29/2022	David P.T. Webb	13.68	14,022.00	Zatko materials review legal research, drafted opposition to motion for leave to amend
08/29/2022	Remy K. Grosbard	16.50	16,912.50	Research on debt financing; team meeting; defensive deposition prep and document review (Durban)
08/29/2022	Simon J. Williams	12.20	11,285.00	strategy
08/29/2022	Alexandra P. Sadinsky	14.50	17,037.50	- defensive discovery doc review (slacks)
08/29/2022	Akua F. Abu	12.00	8,700.00	- Twitter team meeting
08/29/2022	Brittany A. Fish	18.00	14,850.00	Emmy prep; depo team meeting; full team meeting; client call; travel to Toronto; team correspondence
08/29/2022	Jessica L. Allen	1.75	1,268.75	Team meetings
08/29/2022	Jessica L. Allen	8.00	5,800.00	Doc review
08/29/2022	Donald J. Butterworth	5.25	3,806.25	Prepare materials for use in party depositions. Call with consultant re same. Review documents produced by parties and third parties as relevant to same. Revise working matter chronology. Review client-provided materials as relevant to compliance with discovery orders. Call with client re same. Review and revise draft brief.
08/29/2022	Charles M. Melman	16.21	11,752.25	Corey Faibish deposition prep outline and discussions with partner; deposition team meeting; full team meeting; preparation of materials and related review for motion for protective order.
08/29/2022	Adebola O.M. Olofin	14.10	14,452.50	deposition team meeting; full team meeting; conduct document review; deposition prep; review emails; connect with WSGR
08/29/2022	Yarek M. Smagowski	13.20	6,600.00	QC/2L document review for responsiveness and privilege; attend case team meeting re; ongoing case requirements.
08/29/2022	Canem Ozyildirim	16.50	15,262.50	Document review
08/29/2022	Adabelle U. Ekechukwu	9.00	8,325.00	Document review for defensive production.
08/29/2022	Robinson C. Strauss	9.50	4,037.50	Atty requests, depo prep
08/29/2022	Juan Rojas	2.60	1,040.00	Process incoming document production and load to e-discovery database for attorney review per Alexandra Sadinsky request
08/29/2022	Juan Rojas	1.35	540.00	Create key terms searches in e-discovery database to retrieve certain documents of interest per Remy Grosbard request
08/29/2022	Kyaik P. Tan	0.50	175.00	loaded incoming production
08/29/2022	Richard Y. Lam	0.50	237.50	Check permissions on Relativity database hosted by Lighthouse to see if batching permissions are granted to ALS users, attend conference call with case team and vendor to discuss ongoing document review and production.
08/29/2022	Soc Min	1.00	350.00	Loaded third party productions into Relativity for case team review as per Sadinsky, Alexandra P.
08/29/2022	Shera Goldman	0.10	30.00	Obmascik, M - obtain article
08/29/2022	Shera Goldman	0.50	150.00	Ledwig, J - obtain court docs

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Reasonable Big Firm Fees

08/29/2022 Adam M. Gogolak	15.00	21,000.00	
08/29/2022 Claudia T. Morgan	13.14	14,454.00	eDiscovery communications and coordination
08/29/2022 Adam L. Goodman	20.00	25,000.00	attention to discovery
08/29/2022 David E. Kirk	15.40	18,095.00	Offensive discovery, deposition prep, document review, call meetings re defendants' productions, meet and confers, review filings

Put It In Writing

RPC 1.5(f) A fee that is nonrefundable in whole or in part shall be agreed to in writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

This is not difficult!

Does not have to be fancy

Date

PERSONAL AND CONFIDENTIAL

Name & Contact Information

RE: REPRESENTATION AGREEMENT
State of Tennessee v.
Knox County General Sessions Court No.:

Dear

We want to thank you for the opportunity to represent you in the above-referenced matter in the Knox County General Sessions Court. This letter confirms the agreement that has been reached regarding the non-refundable retainer in your case and our obligation to you in the course of the representation.

The amount of the initial non-refundable retainer agreed upon is Dollars and is considered earned when paid. By your signature on this agreement, you are acknowledging the the non refundable nature of the retainer. An expense deposit of Dollars was also agreed upon and will be placed in our trust account. Unlike the non-refundable retainer, any remaining balance from the trust account will be refunded to you, assuming you do not owe the firm for fees or for other matters. The firm will record time pertaining to your representation at our currently hourly rates between \$ to \$ for attorneys, \$ per hour for paralegals and \$ per hour for law clerks and firm investigators. If the time expended exceeds the initial retainer, we will bill you on an hourly basis through the conclusion of the General Sessions Court proceedings. It is understood that if this case proceeds to criminal court, an additional representation agreement will be required.

The amount of the retainer is based upon several factors: (1) the nature and gravity of the offense charged; (2) the complexity of the case; (3) the commitment of the firm to take the case, thus being available to represent you and precluding our acceptance of other employment; (4) the firm's best estimate of the amount of time which will be expended to represent you; and (5) the experience, reputation and ability of the attorney(s) performing services for you in this matter.

The representation of persons in matters of this nature involves a level of commitment beyond that of most other areas of the practice of law, in that it involves issues of liberty and the potential of a criminal record. While this firm cannot and does not assure a favorable result in handling this matter, we always commit ourselves to render our best efforts at effective and zealous representation. The amount of the retainer established in your case also reflects that commitment.

It is the responsibility of our clients to pay for the normal expenses incurred in the course of our representation, such as copying expenses, postage expenses, court reporter fees, travel expenses, computerized research services, et cetera. By mutual agreement, expenses incurred will be billed against the expense deposit you make with the firm. If there are any expenses of a substantial nature, the firm will consult with you prior to incurring those expenses.

Recognizing that storage of closed files is cumbersome and expensive, you and the firm acknowledge that you may take possession of your physical file at the conclusion of the representation,

Name
Date
Page2

and that the firm may beforehand make and retain electronic or physical copies of some or all of the contents of the file. If you do not take possession of the file within one year of the conclusion of the representation, you hereby authorize the firm, in the exercise of its discretion, to destroy your file and any physical or electronic copies at any time.

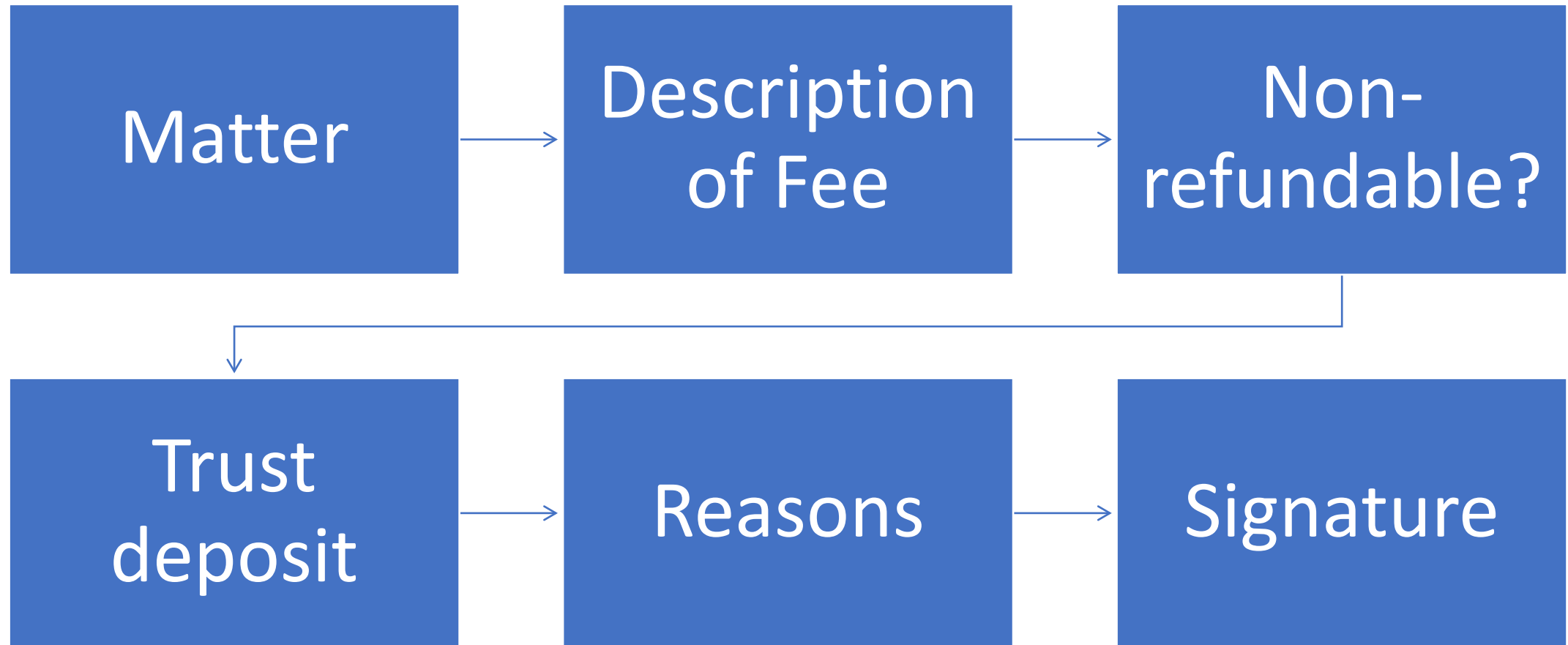
This letter represents the full agreement between you and the firm in this matter. If you have any question or disagreement with this letter, please contact us immediately. Otherwise, please sign the original in the space provided below and return it to the firm.

Sincerely yours,

I have read the representation agreement and understand it to be the full agreement regarding fees and expenses in this case.

Name

Content





TENNESSEE ATTORNEY'S TRUST ACCOUNT HANDBOOK

ISSUED BY:

Board of Professional Responsibility
of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, Tennessee 37027
(615) 361-7500
(615) 367-2480 fax

New Clients

**Represented
Party Rule**

**Responsibilities
to Potential
Clients**

Represented Parties

Rule 4.2 only prohibits, in representation of a *client*, communicating with someone *else* who is represented by counsel in the matter

- Rule 4.2 doesn't protect lawyers – it protects clients. Clients aren't property
- Doesn't prevent second opinion
- Could be reasons client does not want current lawyer notified
- Professional courtesy and ethics might differ
- Duty of confidentiality could prohibit disclosure

Duties to Potential Clients

Conflicts?

RPC 1.8 Specific to Prospective Client

Rule 1.18 only prohibits representation of a client “with interests materially adverse . . . in the same or a substantially related matter.”

If you received info “that could be significantly harmful to the prospective client in the matter.”

Informed consent