

Flat Fees: A Three-Dimensional View

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For a variety of reasons, a lawyer may prefer to charge a client on a flat fee basis and a client may prefer to pay a lawyer on a flat fee basis. For lawyers, it is a means of getting the entire fee for the representation paid up front, obviating the requirement of depositing the funds in a trust account and maintaining complete records of the funds, and eliminating doubt about whether a fee will be paid and concern about pursuing a client for fees if not paid. For clients, flat fees provide predictability and freedom from fear that legal fees will continue to mount. However, there remains an aspect of risk for both parties to flat fee agreements: a client may regret such an agreement if a matter resolves more quickly than anticipated; a lawyer may regret it if the matter entails more legal work than the lawyer anticipated. In 2015, bar counsel published a comprehensive article of the ethics of charging and collecting fees. *The Ethics of Charging and Collecting Fees*, Nancy Kaufman and Constance Vecchione, November 2015. This article expands on the portion of that article that addresses flat fees, focusing on the Massachusetts Rules of Professional Conduct that apply to flat fee agreements.

A flat fee is “a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted.” Mass. R. Prof. C. 1.15, comment 2A. Flat fee agreements provide that a lawyer will charge a client a pre-set amount for a specific scope of work, for instance \$5000 to represent a client charged with a first offense of driving under the influence or \$1500 to draft a will, health care proxy and power of attorney. Unlike unearned hourly fees, which must be held in a trust account, a flat fee need not, but may, be held in an IOLTA or other trust account (*Matter of Kirby*, 29 Mass. Att’y Disc. R. 366, 374-375 (2013)). Flat fees that are not deposited into a trust account are not subject to the detailed recordkeeping

requirements of Mass. R. Prof. C. 1.15. See, Mass. R. Prof. C. 1.15, comment 2A (“the Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of the Rule, including paragraphs (b)(2) and (d)(2)”).

Several of the Massachusetts Rules of Professional Conduct, however, do apply to flat fee agreements and representations. Mass. R. Prof. C. 1.5(b)(1) requires that a lawyer communicate the rate or basis of the fee to a client in writing. Mass. R. Prof. C. 1.5(a) prohibits clearly excessive fees of any kind. Mass. R. Prof. C. 1.16(d) requires an attorney at the termination of a representation to refund any unearned fee to the client. Practitioners who utilize flat fee agreements should understand and be careful to comply with those rules.

Rule 1.5(b) in its current form has been in effect since January 2013 and applies to hourly and flat fee representations.¹ It requires that “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation.” Although lawyers typically comply with this requirement by obtaining their clients’ signatures on a formal representation agreement, by its terms the rule does not require that. A fee letter from the lawyer to client, for example, is sufficient. However, without the client’s signature or other acknowledgement of receipt, it may be difficult to prove that the fee and scope of the agreement were communicated to the client in a timely fashion. Thus, a written, fully-executed fee agreement is clearly the preferable and safest method of complying with Rule 1.5(b)(1).

Probably due to the relatively recent adoption of the current rule, violations of Rule 1.5(b) (often in conjunction with other rule violations), caused by a failure to communicate the terms of the fee arrangement in writing, have been a frequent subject of discipline since the rule

¹ Contingent fees agreements, on the other hand, are governed by the more stringent requirements of Rule 1.5(c), which does require a writing signed in duplicate by both parties, with one copy delivered to the client and one retained by the lawyer.

became effective in 2013. At least eight attorneys have received an admonition for violating Rule 1.5(b), including several for failing to communicate to a client in writing the terms of a flat fee agreement. See, e.g., *Admonition 15-04* (failure to provide client with written statement of scope of representation and basis or rate of fee, where client paid flat fee of \$1500); *Admonition 16-14* (failure to provide written statement of fee, where client paid lawyer \$6300 for representation in seven criminal matters). Where the lack of a written communication about a fee results in a dispute between the lawyer and client about the fee, bar counsel may seek more severe sanctions.

In order for the writing to comply with the provisions of Rule 1.5(b)(1), it must communicate not just the fee, but also the scope of the representation. Although no reported case in Massachusetts has yet addressed the issue, an overly general or vague description of the scope of the representation may not meet the requirements of the rule. For instance, does an attorney's agreement to represent a client in a "divorce" include filing or defending against a contempt petition or request for a restraining order? Does an agreement to represent a buyer at a closing include drafting an escrow agreement if funds are held back, and determining when the escrow conditions are met?

It is certainly in the interest of a lawyer drafting a flat fee agreement to describe the scope of the representation thoughtfully and precisely. The lawyer is, after all, agreeing to do work for a specific fee fixed in advance. If a vague description results in a broad interpretation of the scope, the lawyer may be on the hook to do more work than anticipated for no additional fee. Ambiguous or inadequate descriptions of the scope of work will also lead to disputes about the fee and to unhappy clients who believed that certain work was included in the fee they paid. Lawyers would be well-advised to specifically exclude from the scope of the representation legal work that might become necessary but that is not to be covered by the flat fee.

In a recent SJC matter, *Matter of Diviacchi*, 475 Mass. 1013 (2016), an imprecise description of the scope of the representation was a factor in the discipline of an attorney. The fee agreement, which involved a flat fee that was to be credited against a contingent fee on a recovery, stated that, “the claim, controversy, and other matter with reference to which the services are to be performed are SOVEREIGN BANK v. (CLIENT) & COUNTERCLAIM.” Sovereign sought to recover on a note secured by a mortgage and the counterclaim included various theories of lender liability. The respondent had refused to help the client forestall a foreclosure of the property at issue or attempt to negotiate a short sale with Sovereign and took the position that those matters were not covered by the fee agreement. The Court found that his argument was unpersuasive and affirmed the ruling of the Board that the respondent violated Rules 1.2(a) (failing to seek the lawful objectives of his client) and 1.3 (duty to represent client diligently) by unduly limiting his representation of the client.

A flat fee agreement should also make it clear when payments are due. Some call for the entire amount to be paid before the lawyer does anything. Others may provide for timed payments; i.e. \$5000 due at signing, \$5000 within 90 days, \$10,000 within 180 days; or that payments will become due when certain milestones are reached; e.g., \$5000 when (civil) complaint is filed; \$5000 when a motion to dismiss is denied; \$10,000 when a motion for summary judgement is denied. In an Operating under the Influence-Second or a Possession with Intent to Distribute case, the structure might be: a certain amount to take the case and do initial discovery; another amount for a motion to suppress, and another amount for trial. Whatever the arrangement, it needs to be clearly communicated to the client in writing.

Although flat fees have sometimes been characterized as “earned on receipt”, a lawyer may not characterize a fee as “non-refundable”. *Smith v. Binder*, 20 Mass. App. Ct. 21 (1985) (Appeals Court in dicta notes authority that requiring a client to agree to a non-refundable fee is unethical, given that the right of client to change lawyers at any time was “essential to the lawyer

client relationship.”) Generally, the client has the right to terminate representation at any time and the attorney has the right to withdraw from representation, subject to the provisions of Rule 1.16. Rule 1.16(d) requires that “upon termination of the representation,” a lawyer must refund “any advance payment of fee or expense that has not been earned or incurred.” When a flat fee representation is terminated before the scope of the representation is accomplished, a lawyer who fails to refund any portion of the fees risks violating that rule, as well as Rule 1.5(a), prohibiting clearly excessive fees (discussed below).

Because of the possibility that the lawyer or client will seek to terminate the relationship before the agreed scope of work is completed, the agreement should explain how the fee will be determined in that eventuality. The lawyer is generally entitled to recover for the value of the services rendered; i.e., in *quantum meruit*. See, e.g., *Malonis v. Harrington*, 442 Mass. 692 (2004). Determining the value of the services, however, is seldom simple and there are probably many approaches. Some lawyers include a clause in the agreement providing that in case of early termination, the client will owe the lawyer for the number of hours worked times an hourly rate. This calculation, while straightforward, will not always lead to a fair result, and may violate one or more rules of professional conduct. For example, because of inexperience or unexpected developments, a lawyer may have earned the entire flat fee based on an hourly fee calculation, but not come close to accomplishing the goal of the representation. The client in that situation should not be compelled to hire a new lawyer to finish the matter without the benefit of a commensurate refund of the flat fee already paid.

Although the Supreme Judicial Court has not squarely addressed the issue, the Board of Bar Overseers and courts in other jurisdictions have rejected a broad application of the substituted hourly fee approach. In *Matter of Smith* 13, Mass. Att’y Disc. R. 726, 736-737 (1997), a lawyer charged a client a \$10,000 flat fee for certain criminal defense work but completed only part of it. The lawyer then argued that computed on an hourly basis, he had

performed more than \$10,000 worth of service on the client's behalf. The Board noted that the lawyer's argument "misse[d] the point" because the lawyer and the client did not have an hourly fee agreement, and that "it is self-evident that, having broken his promise to perform the services, [the lawyer] cannot be entitled to retain the entire fee no matter how much time he claims to have expended on the case." In *Disciplinary Counsel v. Summers*, 967 N.E. 2d 183 (Ohio Supreme Ct. 2012), the court, in a flat fee case, held that if "the lawyer withdraws from representation without cause before the work is completed, he cannot retain the entire flat fee by resorting to a mathematical calculation of his billable hours. To hold otherwise would leave clients at the mercy of lawyers who charge significant flat fees to provide complete representation only to withdraw when the demands of the case become too onerous."

Thus, a flat fee agreement more generally might provide that, if the representation is terminated by either party before it is concluded, the question of whether the client will be entitled to any refund of the payments already made, and the amount of such refund, will depend on the benefit to the client of the services performed by the lawyer, as well as the timing and circumstances of the termination. This language is adapted from language in the form contingent fee agreements in Rule 1.5(f). Although such a provision leaves substantial room for disagreement, it nonetheless encompasses the considerations that should govern the determination of a fair resolution of the refund issue.

In any event, because of the possibility of early termination, lawyers who charge flat fees should have the funds available to make an appropriate refund. Some lawyers deal with that possibility by maintaining flat fees in an IOLTA account for some portion of the representation, which, as stated above, is permitted but not required by the rules.

Finally, a flat fee agreement may result in a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a). See *Too Much of A Good Thing: Understanding the Rule 1.5(a) Prohibition on Clearly Excessive Fees*, Robert M. Daniszewski, October 2017. Rule 1.5(a) sets out eight factors

to be considered in determining the propriety of the fee.² As is true of other fee agreements (see, e.g., *Matter of Fordham*, 423 Mass. 481 (1996), a flat fee could be deemed clearly excessive if the fee was significantly higher than that charged for the same kind of matter by other lawyers of similar experience in the same locality. A flat fee could also violate Rule 1.5(a) on the basis of one or more of the other eight factors. In *Matter of Broderick*, 20 Mass. Att’y Disc. R. 53 (2004), a lawyer charged co-executors of an estate a \$40,000 flat fee to cover legal fees to complete the probate of an estate. The fee was found to be clearly excessive because the work was neither novel nor difficult, the lawyer brought no particular expertise to the work, and he did not finalize the estate.

In another matter, an upfront fee that was reasonable on its face violated the prohibition against clearly excessive fees because the lawyer produced no benefit to the client. In *Matter of Woodhouse*, 23 Mass. Att’y Disc. R. 787 (2007), a lawyer charged a client a \$10,000 upfront fee, which was to be credited against a potential contingent fee, for filing a wrongful termination case. When the case filed by the lawyer was dismissed, partly because of the lawyer’s lack of competence and diligence, the client complained and bar counsel filed a petition for discipline.

² **RULE 1.5: FEES**

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive 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.

Ultimately, a single justice of the Supreme Judicial Court upheld the finding of the Board of Bar Overseers that the fee was clearly excessive given the nature of the case, the services performed, and the results obtained.

Flat fee arrangements play an important role in the modern practice of law. They bring predictability of costs to clients by capping fees at a set amount, while relieving lawyers of the burdens of billing and fee-collection. However, lawyers who work on a flat-fee basis must ensure that the arrangement is carefully spelled out in a contemporaneous writing and that the fee charged and collected is reasonable, whether the representation is completed or terminated before the matter is concluded.