

## **SCR 20:1.5 Fees** *(Effective July 1, 2016)*

(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) (1) 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, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(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 par. (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 a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

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

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

(f) Except as provided in SCR 20:1.5(g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5(h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

(g) A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that review of the lawyer's fee by a court of competent jurisdiction is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

(1) Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

- a. The amount of the advanced payment.
- b. The basis or rate of the lawyer's fee.
- c. Any expenses for which the client will be responsible.
- d. The lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.

e. The lawyer's obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.

f. The ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.

(2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

a. A final accounting, or an accounting from the date of the lawyer's most recent statement to the end of the representation, regarding the client's advanced fee payment.

b. A refund of any unearned advanced fees and costs.

c. Notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting.

d. Notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

(3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

(4) Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

(h) (1) At least 5 business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to court order, a lawyer shall transmit to the client in writing all of the following:

a. An itemized bill or other accounting showing the services rendered.

b. Notice of the amount owed and the anticipated date of the withdrawal.

c. A statement of the balance of the client's funds in the lawyer's trust account after the withdrawal.

(2) The lawyer may withdraw earned fees on the date that the invoice is transmitted to the client, provided that the lawyer has given prior notice to the client in writing that earned fees will be withdrawn on the date that the invoice is transmitted. The invoice shall include each of the elements required under SCR 20:1.5(h)(1).

(3) If a client makes a particularized and reasonable objection to the disbursement described in SCR 20:1.5(h)(1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a particularized and reasonable objection to a disbursement described in SCR 20:1.5(h)(1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client's objections do not present a basis to hold funds in trust or return funds to the trust account under SCR 20:1.5(h). The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client's informed consent, in writing. The lawyer shall promptly advise the client in writing of the lawyer's position regarding the fee and make reasonable efforts to clarify and address the client's objections.

## WISCONSIN COMMENT

### **SCR 20:1.5(f) Advances for fees and costs.**

Lawyers are obligated to hold advanced fee payments in trust until earned, or use the alternative protection for advanced fees as set forth in SCR 20:1.5(g). Additional requirements for advanced fees are identified in SCR 20:1.0(ag). Sometimes the lawyer may receive advanced fee payments from 3rd parties. In such cases, the lawyer must follow the requirements of SCR 20:1.8(f). In addition, the lawyer should establish, upon receipt or prior to receipt of the advanced fee payment from a 3rd party, whether any potential refund of unearned fees will be paid to the client or 3rd-party payor. This may be done through agreement of the parties or by the lawyer informing the client and 3rd-party payor of the lawyer's policy regarding such refunds. Lawyers also receive cost advances from clients or 3rd parties. Since January 1, 1987, the supreme court has required cost advances to be held in trust. Prior to that date, the applicable trust account rule, SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers to hold in trust accounts. However, by order, dated March 21, 1986, the supreme court amended SCR 20.50(1) as follows: "All funds of clients paid to a lawyer or law firm, ~~other than advances for costs and expenses,~~ shall be deposited in one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows . . . ." This requirement is specifically addressed in SCR 20:1.5(f).

### **SCR 20:1.5(g) Alternative protection for advanced fees.**

SCR 20:1.5(g) allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.5(f). The provision regarding court review applies to a lawyer's fees in proceedings in which the lawyer's fee is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem's fee may be subject to judicial review. In any proceeding in which the lawyer's fee must be challenged in a separate action, the lawyer must either deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer's fee remains subject to the requirement of reasonableness under SCR 20:1.5(a) as well as the requirement that unearned fees be refunded upon termination of the representation under SCR 20:1.16(d). A lawyer must comply either with SCR 20:1.5(f) or SCR 20:1.5(g), and a lawyer's failure to do so is professional misconduct and grounds for discipline. The writing required under SCR 20:1.5(g)(1) must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and the Milwaukee Bar Association, within 30 days of receiving a request for refund, and that the lawyer is obligated to comply with an arbitration award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin Lawyers' Fund for Client Protection.

If the client's fees have been paid by one other than the client, then the lawyer's responsibilities are governed by SCR 20:1.8(f). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15(e)(3).

SCR 20:1.5(g) applies only to advanced fees for legal services. Cost advances must be deposited into the lawyer's trust account.

Advanced fees deposited into the lawyer's business account pursuant to this subsection may be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds under this section. Cost advances are subject to SCR 20:1.15(b)(1) or SCR 20:1.15(f)(3)b.

**SCR 20:1.5(h) Withdrawal of non-contingent fees from trust account.**

SCR 20:1.5(h) applies to attorney fees, other than contingent fees. It does not apply to filing fees, expert witness fees, subpoena fees, and other costs and expenses that a lawyer may incur on behalf of a client in the course of a representation. In addition, this section does not require contingent fees to remain in the trust account or to be returned to the trust account if a client objects to the disbursement of the contingent fee, provided that the contingent fee arrangement is documented by a written fee agreement, as required by SCR 20:1.5(c). While a client may dispute the reasonableness of a lawyer's contingent fee, such disputes are subject to SCR 20:1.5(a), not to this subsection. A client's objection under SCR 20:1.5(h)(3) must offer a specific and reasonable basis for the fee dispute in order to trigger the lawyer's obligation to keep funds in the lawyer's trust account or return funds to the lawyer's trust account. A generalized objection to the overall amount of the fees or a client's unilateral desire to abrogate the terms of a fee agreement should not ordinarily be considered sufficient to trigger the lawyer's obligation. A lawyer may resolve a dispute over fees by offering to participate and abide by the decision of a fee arbitration program. In addition, a lawyer may bring an action for declaratory judgment pursuant to § 806.04, Wis. Stats. to resolve a dispute between the lawyer and a client regarding funds held in trust by the lawyer. The court of appeals suggested employment of that method to resolve a dispute between a client and a 3rd party over funds held in trust by the lawyer. See Riegleman v. Krieg, 2004 WI App 85, 271 Wis. 2d 798, 679 N.W.2d 857.

Additionally, when a lawyer's fees are subject to final approval by a court, such as fees paid to a guardian ad litem or lawyer's fees in formal probate matters, objections to disbursements by clients or 3rd party payors are properly brought before the court having jurisdiction over the matter. A lawyer should hold disputed funds in trust until such time as the appropriate court resolves the dispute.

**WISCONSIN COMMITTEE COMMENT**

Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be \$1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.

In addition, paragraph (b) differs from the Model Rule in requiring that the purpose and effect of any retainer or advance fee paid to the lawyer shall be communicated in writing and that a lawyer shall promptly respond to a client's request for information concerning fees and expenses. The lawyer should inform the client of the purpose and effect of any retainer or advance fee. Specifically, the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer. A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal

services. These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are subject to SCR 20:1.15 and SCR 20:1.16. Retainers are to be distinguished from an "advanced fee" which is paid for future services and earned only as services are performed. Advanced fees are subject to SCR 20:1.5, SCR 20:1.15, and SCR 20:1.16. See also State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-93-4 (1993).

Paragraph (d) preserves the more explicit statement of limitations on contingent fees that has been part of Wisconsin law since the original adoption of the Rules of Professional Conduct in the state.

Paragraph (e) differs from the Model Rule in several respects. The division of a fee "based on" rather than "in proportion to" the services performed clarifies that fee divisions need not consist of a percentage calculation. The rule also recognizes that lawyers who formerly practiced together may divide a fee pursuant to a separation or retirement agreement between them. In addition, the standards governing referral arrangements are made more explicit.

### **Dispute Over Fees**

Arbitration provides an expeditious, inexpensive method for lawyers and clients to resolve disputes regarding fees. It also avoids litigation that might further exacerbate the relationship. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, 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. See also ABA Comment [9].

### **Fee Estimates**

Compliance with the following guidelines is a desirable practice: (a) the lawyer providing to the client, no later than a reasonable time after commencing the representation, a written estimate of the fees that the lawyer will charge the client as a result of the representation; (b) if, at any time and from time to time during the course of the representation, the fee estimate originally provided becomes substantially inaccurate, the lawyer timely providing a revised written estimate or revised written estimates to the client; (c) the client accepting the representation following provision of the estimate or estimates; and (d) the lawyer charging fees reasonably consistent with the estimate or estimates given.

## **ABA 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. 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 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 post-judgment 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, and most 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 if each lawyer assumes 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 responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. 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.

### **Disputes over Fees**

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