Vermont Rules of Professional Conduct

Rule 1.5 - Fees

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This unofficial version was last updated on ***November 14, 2022****.*

Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 1.5 was last amended in 2016.
  - Paragraphs (f) and (g) were added to clarify the conditions that must be present for a lawyer to treat a fee that is paid in advance as the lawyer's own upon receipt.
- Vermont's rules on fees that are labeled "non-refundable" or "earned upon receipt."
- Back to the Basics: Contingent Fees

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 the 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 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 spousal maintenance or support, or property settlement in lieu thereof. Contingent fees are not forbidden in domestic relations matters which involve the collection of:

(i) spousal maintenance or property division due after a final judgment is entered or

(ii) child support and maintenance supplement arrearages due after final judgment,

provided that the court approves the reasonableness of the fee agreement.

(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 each lawyer assumes joint 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.

(f) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation (i) that the funds will not be refundable, and (ii) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee.

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client's right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties' agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this rule, a fee agreement may describe a fee as "nonrefundable," "earned on receipt," a "guaranteed minimum," "payable in guaranteed installments," or other similar description indicating that the funds will be deemed earned regardless of whether the client terminates the representation.

(g) A nonrefundable fee that complies with the requirements of (f)(l)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer's trust account. Any funds received in advance of rendering services that do not meet the requirements of (f)(1)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule 1.15(c) until such funds are earned by rendering services.

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. Exceptions to this provision permit 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 for resolution of fee disputes, such as arbitration or mediation, has been established in the representation agreement, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should submit to it if the client requests. 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.

Reporter's Notes—2016 Amendment

Rules 1.5(f) and (g) are added to clarify the conditions that apply to a lawyer's acceptance of a nonrefundable fee. The provisions are based on Maine Rule of Professional Conduct Rule 1.5(h)-(i), adopted in June 2014.

Rule 1.5(f) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees pursuant to Rule 1.5(a). Paragraph (f)(1) requires certain safeguards to ensure the client's informed consent in order to avoid a client's confusing a nonrefundable fee with an advance. Paragraph (f)(2) prohibits a lawyer from securing a client's advance waiver of the right to challenge the reasonableness of a fee. A client's written agreement to a fee is a factor in the determination of its reasonableness under Rule 1.5(a). A lawyer should not press further and request or require the client to waive the client's right to have the reasonableness of a nonrefundable fee determined in accordance with law. Paragraph (f)(3) provides examples of terminology in the agreement that will indicate that the conditions of the rule are satisfied.

Rule 1.5(g) provides that, without the client's informed consent to nonrefundability in accordance with Rule 1.5(f)(1), the lawyer must treat the funds as an advance to be credited against future bills for services, must keep such funds in a trust account in accordance with Rule l.15A until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation pursuant to Rule 1.16. Subdivision (g) also provides that if conditions (f)(1) and (f)(2) are met, nonrefundable fees cannot be deposited in the lawyer's trust account as those nonrefundable fees are not the property of the client.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.5 is amended to conform to changes in Model Rule 1.5 but retains the current Vermont provisions of Rule 1.5(d)(1) that permit contingent fees in certain domestic relations matters. See Reporter's Notes to V.R.P.C. 1.5(d) (1999).

In *In re Sinnott*, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.), the Court held that the PRB could reasonably find that a fee charged pursuant to a boilerplate agreement without regard to work to be performed was not ''reasonable'' under V.R.P.C. 1.5(a) without the need to consider the factors provided by the rule. In *State v.*
Homeside Lending, Inc., 2003 VT 17, ¶ 33, 175 Vt. 239, 826 A.2d 997, finding that notice in a class action was inadequate, the Court referred to the requirement of ABA Model Rule 1.5(c) (also found in V.R.P.C. 1.5(c)) that a contingent fee agreement must ''state the method by which the fee is to be determined.''

The ABA Reporter's Explanation is as follows in pertinent part:

TEXT:

1. Paragraph (a): Substitute Model Code standard

The current rule requires that a lawyer's fee be reasonable, but it does not state a corollary prohibition of a fee that is larger than reasonable. The omission thus makes it harder than necessary to impose discipline for excessive fees. The Commission substituted the language of the Model Code prohibition for the [former] first sentence of (a). No change in substance is intended.

2. Paragraph (a): Add explicit prohibition on unreasonable expenses

Although ethics committee opinions have assumed that lawyers are prohibited from charging unreasonable expenses, as well as unreasonable fees, the [former] Rule does not say so explicitly. The Commission added language clarifying the lawyer's obligation, in order both to better educate lawyers as to their duties and to facilitate the imposition of discipline, where applicable. No change in substance is intended.

4. Paragraph (b): Add scope of representation and expenses to written notice

As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee. Further, the Commission believes that issues about expenses are often at least as controversial as those about fees. Indeed, clients often do not distinguish between fees and expenses. Thus, proposed paragraph (b) includes statements about the scope of the representation and client responsibility for expenses as well as fees in the … agreement. Changes in the basis or rate of the fee or expenses must also be communicated … but not changes in the scope of the representation, which may change frequently over the course of the representation.

6. Paragraph (c): Clarify that contingent fee agreement must be signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

7. Paragraph (c): Additional notification regarding expenses in contingent fee agreements

Unlike the Model Code, the Model Rules permit lawyers to advance litigation expenses, with repayment contingent on the client prevailing. Nevertheless, lawyers are not required to make such repayment contingent. The Commission believes that clients may be misled without a clear statement, in the contingent fee agreement, that there are expenses for which the client will be liable whether or not the client is the prevailing party.

8. Paragraph (e): Division of fees

The Commission recommends retaining the current text of this Rule, with the sole exception that the client must agree, and the agreement must be confirmed in writing, to the participation of each lawyer, including the share of the fee that each lawyer will receive.

COMMENT:

[1] This Comment is entirely new. It introduces paragraph (a) by stating that lawyers must charge both fees and expenses that are reasonable under the circumstances. It explains that the factors set forth in paragraphs (a)(1) through (8) are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in-house, along the lines suggested in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).

[3] This Comment is entirely new. It confirms that contingent fees, like other fees, are subject to the reasonableness standard of paragraph (a), including consideration of all of the factors that are relevant under the circumstances. It further refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. (This is a revision of the last sentence in former ABA [Comment [3] [third paragraph of former Vermont Comment], revised to include an additional reference to ceilings on the percentage allowable under law.) It also refers to applicable law that may govern situations other than a contingent fee.

[4] This amendment to [former ABA] Comment [2] [second paragraph of former Vermont Comment] eliminates the vague "special scrutiny" language and substitutes a cross-reference to the Rule 1.8(a) requirements for business transactions with a client when a fee is to be paid in property instead of money. Rule 1.8(a) treatment is not stated in absolute terms, but the possibility is strongly suggested. The recent ABA Business Law Section report on alternative billing practices agreed that Rule 1.8(a) treatment should be given to fees paid in stock or property.

[5] The Commission proposes to delete the next to the last sentence of [former ABA] Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative. [6] A number of ethics committee opinions have interpreted the current Model Rule to permit contingent fees in post-decree family law matters, i.e., collecting arrearages that have been reduced to judgment, because such fee arrangements do not implicate the

same policy matters that are implicated when fees are contingent upon securing a divorce or on the amount of alimony, support or property order. [The former Vermont provisions permitting this practice are retained.]

[7] The changes reflect the changes made to paragraph (e). The Commission proposes revising the explanation of "joint responsibility" to entail legal responsibility, including financial and ethical responsibility, as if the lawyers were associated in a partnership. This is the interpretation that has been given to the term according to ABA Informal Opinion 85-1514, as well a number of state ethics opinions.

[8] This new Comment seeks to eliminate a misunderstanding that might arise about whether the requirements of paragraph (e)(1) must be satisfied when a lawyer leaving a law firm and the firm agree to share some part of a fee to be received in the future. Technically, the future division would be between lawyers who were no longer members of the same law firm. None of the usual reasons for requiring the client's agreement to the arrangement apply to such fee divisions, however, and this Comment is intended to make that clear.

[9] The proposed change highlights that lawyers must comply with fee arbitration or mediation procedures in jurisdictions where they are mandatory.

Reporter's Notes

This rule substitutes a prescription that a lawyer's fee be reasonable for the former Code's proscription of illegal or clearly excessive fees. In addition. the rule provides that where the lawyer has not regularly represented the client. the fee basis shall be communicated to the client, preferably in writing, before or within a reasonable time after the representation has begun. The rule also differs from the Code by requiring rather than merely recommending that contingent fee agreements be in writing.

Subsection (d) departs from the former Code and the ABA Model Rules in specifically allowing contingent fees in certain domestic relations matters. The change was prompted by the study committee's concern that, in many instances, there is no practical way for families to recover support and maintenance arrearages due unless lawyers are allowed to take these cases on a contingency basis. An ethical issue is raised if a custodial parent, in order to collect any support dollars, contracts away a portion of those dollars which are due for the benefit of the child. By requiring court approval of such contingency fees, as is presently allowed in personal injury cases involving minors, it is expected that the interests of the child will be fairly protected.

Subsection (e) permits fee division between lawyers not in the same firm, as long as the fee is reasonable, the client consents, and the fee is in proportion to the services performed or in proportion to the responsibility assumed by each lawyer. The Vermont Code permits such division, so long as the fee is reasonable, the client consents, and the fee is in proportion to services performed and in proportion to the responsibility assumed. Thus under the rules, but not under the Code, a referral fee is permitted in limited situations.

The comment calls for arbitration of fee disputes. Lawyers may fulfill this aspirational directive by submitting a dispute to the Vermont Bar Association's Fee Arbitration Committee or by seeking arbitration under the Vermont Arbitration Act, 12 V.S.A. §§ 5651-5681.

ANNOTATIONS

1. Written fee agreement. Respondent committed professional misconduct in failing to put a contingent fee agreement in writing. Although the complainant was physically unable to sign one, no signature was required under the rule at the time; even if a signature had been required, there were avenues available to obtain some kind of written approval from the complainant; and there was much concerning the fee agreement that was unclear to both respondent and the complainant. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

2. Excessive fee. Facts supported the panel's finding that respondent, however erroneously, believed that he would contribute to a greater degree to complainant's case. Because he was not consciously aware that he would do very little work for a large fee, his actions in charging an excessive fee were negligent. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Respondent's agreement to a 12 percent contingent fee for facilitating communication between the complainant and another attorney was misconduct. Respondent's role did not require a large investment of time or labor; his tasks did not require specialized legal knowledge or legal experience; and facilitating communication would not preclude respondent from accepting other employment. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

In determining that respondent charged an excessive contingent fee, it was irrelevant that respondent did not actually bill the complainant for the contingent fee. In contracting with the complainant for 12 percent of the complainant's recovery, respondent attempted to violate the directive that lawyers charge a reasonable fee, which was a violation of the rule stating that it was unprofessional conduct for a lawyer to attempt to violate the Rules of Professional Conduct. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

3. Sanctions. Public reprimand was an appropriate sanction for an attorney who knowingly failed to put a contingent fee agreement in writing and who negligently attempted to charge an unreasonable 12 percent

contingent fee for facilitating communication between the complainant and another attorney. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461 .

Cited. Cited in In re Sinnott, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.).