# Financial Dealings with Clients

**by Alice M. Plastoris**

The practice of law, no matter how noble an endeavor, is still a business, and the goal of any business is to be profitable. Lawyers, whether sole proprietors or in a firm, are entitled to be and should be compensated for the services they provide. In order for that to happen, lawyers should, within the confines of the ethics rules and court rules, use good business sense and practices in running their practice, and in their financial dealings with clients.

After determining who or what is the target client base and obtaining that business, there are certain business practices that must be in place to govern how clients retain the lawyer, and how the lawyer will get paid during the representation and after the representation has concluded. In order to accomplish this, the lawyer should address the following points: 1) retainer agreements and determining the scope of the representation; 2) the method of payment including credit cards; and 3) collecting his or her fees for services rendered.

### Disclosure and the Initial Consultation

RPC 1.4(b) requires an attorney to provide the client with enough information reasonably necessary to permit them to make informed decisions regarding the representation. The attorney must discuss this with the client during the initial consultation, addressing issues including the fee arrangement and scope of the representation. If the lawyer decides to decline the representation, it should be addressed in writing to the client.[1]

### Scope of the Representation

Once the lawyer has met with the client and determined who the client is, the type of legal matter and what services are to be performed, the lawyer and the client must agree upon the scope and objectives of the representation. RPC 1.2(a) provides that a lawyer shall abide by the client's decision concerning the scope and objectives of the representation. A lawyer may limit the scope of the representation if doing so is reasonable under the circumstances, and the client gives consent.[2]

Any limitation should be thoroughly discussed with the client and set forth in the retainer agreement.[3] For example, in the *Laufer* case the attorney limited the representation to the drafting of the marital settlement agreement in a divorce based on the representations of the client.[4]

### Retainer Agreements

At the outset of an attorney-client relationship, the attorney should provide the client with a written retainer agreement to be signed by the client and the attorney.[5] This document benefits both the client and the lawyer by setting forth the scope of the representation, the services to be provided, and the type of fees to be charged. The retainer agreement will govern the expectations and duties of both parties to the agreement. It also serves as a basis of the contract for services to be rendered and the payment by the client for those services. The retainer agreement should clearly set forth the scope of the representation, including the services to be rendered, the services not being rendered and the type of fees and costs to be charged.[6]

The fees charged to the client must be reasonable.[7] The type of fee arrangement and the amount of the fee must be reasonable. The factors to be considered in determining reasonableness are set forth in RPC 1.5.[8]

Depending on the type of matter, the fee arrangement may vary. A lawyer may charge an initial consultation fee.[9] In general, the types of fee arrangements are as follows:

1. contingency fee;
2. hourly rate;
3. flat fee; or
4. hybrid of hourly fee or flat fee and contingency fee.

RPC 1.5(h) simply requires a written fee agreement with the client when a lawyer has not regularly represented the client. However, it is prudent business practice to have a written fee agreement with a client for every representation.

***Contingency Fee***

A written fee agreement is mandatory in contingency fee cases[10] and in civil family actions.[11] RPC 1.5(c) provides the requirements of a contingency fee arrangement with a client that must be followed. Contingency fee arrangements are not allowed in civil family actions or criminal cases.[12] Contingent fees pursuant to Rule 1:21-7 in civil family actions are only permitted regarding claims based on tortuous conduct of another, and shall have a separate fee agreement.[13]

A contingency fee arrangement must contain the percentages for compensation to the attorney.[14] It must state the method by which the fee is to be determined and other expenses to be deducted from the recovery to be paid to the lawyer.[15] Upon the conclusion of the 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.[16]

***Fee Sharing***

In general, fee sharing with another lawyer not in the same firm is prohibited. RPC 1.5(e) governs fee sharing between lawyers not in the same law firm. Fee sharing is permitted *only* if all of the following factors are met: 1) the division of the fee is proportionate to the services performed by each attorney; 2) the client is notified in writing of the fee division; 3) the client consents; and 4) the total fee is reasonable.[17]

***Independence of Lawyer***

In today's economy, more and more parents are paying for the legal fees of their children. In those circumstances, please keep in mind that the third party paying the legal fees is not the client, and should not control the representation. The duty is to the client, and the attorney-client privilege applies solely to the client. RPC 5.4 governs the professional independence of a lawyer. A lawyer shall not permit a person who recommends, employs or pays for legal services for another to direct or regulate the lawyer's professional judgment in rendering legal services.[18] However, as a practical matter, the third party agreeing to pay the legal fees should execute the retainer agreement as the guarantor, in addition to the actual client.

***Costs***

A retainer agreement should also set forth what costs and out-of-pocket expenses the client will be responsible for paying during the representation. The costs charged should be reasonable and necessary.[19] A lawyer may only charge clients reasonable expenses actually incurred by the lawyer.[20] Expense items are not to be transformed into a profit center by imposing a fixed monthly office charge. Expenses must actually be incurred on behalf of the client for their particular legal matter.[21]

***Civil Family Actions***

Retainer agreements in civil family actions are specifically governed by Rule 5:3-5. Every agreement for legal services *must* be in writing and signed by both the attorney and the client. The client must receive a fully executed copy.[22]

The retainer agreement must have annexed to it the *Statement of Clients Rights and Responsibilities* signed by the client, in the form appearing in Appendix XVIII of the court rules.[23]

The retainer agreement *must* include:[24]

1. a description of the legal services to be provided;
2. a description of legal services *not* encompassed by the agreement, such as real estate transactions, municipal court, tort claims, appeals, domestic violence proceedings, etc.
3. the method by which the fee will be computed;
4. the amount of the initial retainer and how it will be applied;
5. when bills are rendered, which shall be no less frequently than once every 90 days, provided services are rendered within the period;[25]
6. the name of the primary attorney having responsibility for the representation and hourly rate;
7. whether and in what manner the initial retainer is required to be replenished;
8. when payments are to be made;
9. whether interest will be charged including the rate;
10. statement of expenses and disbursements for which the client is responsible and how they will be billed;
11. the effect of counsel fees awarded on application to the court pursuant to Rule 5:3-5(c) and Rule 4:42-9;
12. the availability of complementary dispute resolution (CDR) programs.

***Limitations on Retainer Agreements***

As previously stated, contingency fees are prohibited in criminal and family actions. The court rules also prohibit a lawyer from holding a security interest or mortgage or other lien on the client's property interest to insure payment of fees during the representation.[26] A lawyer may take a security interest in the property of a *former* client after the conclusion of the matter, in accordance with RPC 1.8(c).[27]

In a civil family action, the retainer agreement shall *not* include a provision for a non-refundable retainer.[28]

A lawyer also shall *not* limit the lawyer's liability to the client for malpractice in the retainer agreement.[29]

A lawyer shall *not* acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client, *except*:[30]

1. a lien granted by law to secure a lawyer's fee and expenses; or[31]
2. a contract for a reasonable contingency fee.[32]

***Award of Counsel Fees***

In certain instances, the court may award counsel fees to a party.[33] A retainer agreement should provide that even if fees are awarded by the court to be paid by another party to the litigation, the client is still responsible for payment of the attorney's fees for services rendered to them by the lawyer or law firm, unless the matter is a contingency fee case or other arrangements are made with the client regarding the attorney fee award.

***Withdrawing From Representation***

A retainer agreement should also advise the client of all reasons why a lawyer may withdraw from the representation of the client.[34] A lawyer may withdraw either by consent of the client or by requesting permission from the court, if litigation is pending, and for the following reasons:

1) the client insists the lawyer do something illegal;
2) the client does not follow the lawyer's advice;
3) the client does not answer telephone calls or letters;
4) the client does not cooperate;
5) the client tells a lie under oath or tells the lawyer the client will do so;
6) the client fails to pay for legal services on time; or
7) for other good or valid reasons.

If litigation is not pending, a lawyer may withdraw upon notice to the client for any of the reasons stated above.

## Method of Payment

In running a practice or law firm, a lawyer must determine the method of payment to be accepted from clients. Of course the most obvious method of payment from a client is cash or check. When receiving payments from clients, a lawyer must abide by Rule 1:21-6 regarding bookkeeping records for their business and trust accounts. A lawyer is also required to retain these records for seven years after the event or representation, including copies of all retainer agreements, client statements and bills rendered.[35]

Many lawyers and law firms accept credit cards such as Visa, MasterCard, American Express and Discover card. In order to accept credit cards, the lawyer must enter into a merchant services agreement with a bank or other merchant services provider. The fees for accepting credit cards vary depending on the institution providing the service and the type of card being accepted. For example, Visa and MasterCard fees are typically one to 1.5 percent of the charged amount, but American Express can be as high as three percent or more. A lawyer or law firm must also decide whether to purchase the credit card machine or lease it.

Accepting credit cards improves cash flow, and many times can insure payment. It also lessens the risk of having the lawyer's fees discharged in bankruptcy because the lawyer has already been paid, so the client will list the credit card in the bankruptcy. When sending statements and bills to the client, include a form advising that the firm accepts credit card payments, and provide a space for the client to fill in the credit card information to pay the bill.

The fees associated with the credit card charges to the merchant services provider are essentially bank charges, and deductible business expenses. The minimal processing cost to the lawyer of accepting credit cards is far outweighed by the dual benefits of improved cash flow into the business and ensuring payment by the client.

A lawyer must also decide whether the credit card charges will be electronically deposited into their business account, trust account or a combination of both, when setting up the merchant services account. This will depend on the type of transactions anticipated, and the cost to acquire the equipment. Many merchant services companies only lease equipment, or require there be a separate machine for each account. Diligent inquiry and negotiation is prudent when embarking on the merchant services adventure.

There is, however, a serious pitfall to be considered when accepting credit cards. Lawyers should be aware that the consumer has the right to dispute the transaction or report a fraudulent use of the credit card (even when there is none). For example, a client charges a retainer or makes a payment and then becomes unhappy and does not want to pay the attorney's fees, so they dispute the charge with Visa. If this happens, the merchant services company will take the funds from the account where they were deposited. The credit will occur prior to receiving written notice of the dispute, which arrives in the mail approximately 14 days later. In the meantime, the bank account and cash flow is seriously disrupted. If the deposit was made to the attorney trust account and already disbursed, this can cause a serious problem for the lawyer.

An even more serious problem occurs more frequently in civil family actions, where the parties have a joint credit card. For example, one spouse charges the retainer for legal fees to the joint

credit card. The other spouse notifies the credit card company that the transaction with the law firm was "fraudulent." This situation initially is a nightmare, especially if the funds were deposited into the lawyer's trust account. Because the transaction is reported as fraudulent, the merchant services company will put a hold on *all* charge transactions to your firm, even if the other charge transactions are undisputed payments made by other clients. The result is major cash flow disruption, bounced checks because the funds are removed from the bank account and credits given to other clients for payments made are put on hold because you have not received the funds. This hold under the merchant services agreement can last as long as 364 days.

If this happens, the following steps *must* be taken:

1. Immediately respond *in writing* to the merchant services company with a copy of the retainer agreement, invoice for services rendered and signed receipt by the client (the authorized joint card holder), and explain the representation and providing of services to the client.
2. Immediately notify the client that made the payment with the credit card, requesting they contact the credit card company and advising that the payment will not be credited to the retainer or outstanding balance owed.
3. If there is a court order requiring the payment of fees, provide a copy of the order.
4. Make an application to the court to compel payment and withdrawal of the fraud charge. If the fraud charge is made by the other spouse or other cardholder, ask the court to require that party to pay all damages incurred (*i.e.*, bank charges) and compel that the party takes *all* steps to withdraw the fraud complaint immediately and remove the hold on the merchant services account and restore all funds. Then send this order to the merchant services company.

It is very important, when accepting credit cards, to have a signed retainer agreement with each client, and to keep all bills, statements and signed receipts by the client.

## Getting Paid

Ensuring an attorney will get paid for providing legal services to clients begins at the outset of the representation. First, discuss the representation and the responsibility of the client to pay for services rendered. Second, prepare a retainer agreement, review it with the client, and have it executed; having a signed retainer agreement is the bedrock of getting paid. Also, send regular bills to the client for services rendered, and regularly communicate with the client regarding the fees that are due to avoid carrying a large receivable, resulting in the need to sue the client later.

In contingency cases, an attorney assumes some risk because the outcome of the case determines the compensation for the lawyer. So upon the initial meeting with the client, garner enough information to determine the merits of the case and the likelihood of success and getting paid.

An attorney must also be aware of actions in which a fee is allowable, which are governed by Rule 4:42-9. Attorney fees may be awarded in the following types of matters:

1. family actions;[36]
2. out of a fund in court;
3. in a probate action;
4. in an action for the foreclosure of a mortgage;
5. in an action to foreclose a tax certificate(s);
6. in an action upon a liability or indemnity policy of insurance in favor of a successful claimant;
7. as expressly provided by these rules with respect to any action; and
8. in all cases where attorney's fees are permitted by statute.

In all application for fees pursuant to Rule 4:42-9 or other rule or statute, a lawyer must submit an affidavit of services that complies with Rule 4:42-9(b) and (c) and in family actions with Rule 5:3-5. The fees must also be reasonable pursuant to RPC 1.5, and the affidavit must set forth the requirements contained in RPC 1.5(a).

### *Attorney Charging Lien*

Once a representation has terminated, an attorney is entitled to an attorney lien for services rendered. Pursuant to N.J.S.A. 2A:13-5 and 2A:13-6, an attorney is entitled to a lien for services rendered in the action. The lien attaches to any proceeds or property received by the client by way of settlement, judgment, decision or final order. Notice should be given by the attorney of the lien and the amount sought to the client, successor counsel, if any, and opposing counsel. In many instances, a motion should be filed with the court to perfect the lien. Any application for a lien must comply with Rule 1:20A-6 (pre-action notice).

### *Collection of Fees*

Before a lawyer can sue a client for fees owed for services rendered, Rule 1:20A-6 requires that the client be served with a pre-action notice.

Rule 1:20A-6 provides as follows:

> No lawsuit to recover fees may be filed until the expiration of the 30 day period herein giving Pre-Action Notice to the client; however, this shall not pre-

> vent a lawyer from instituting an ancillary legal action. Pre-Action Notice shall be given in writing, which shall be sent by certified and regular mail to the last known address of the client, or, alternatively, hand delivered to the client...

The notice must also contain the name and address of the current secretary of the fee committee in the district where the lawyer maintains an office.[37] The notice must specifically advise the client of the right to request fee arbitration within 30 days; if the client does not promptly do so, he or she will lose the right to initiate fee arbitration.[38] If the client does not request fee arbitration, and the lawyer files a collection suit against the client for fees, the complaint must allege giving the pre-action notice to the client or be dismissed.[39]

A collection complaint against a client should contain a separate count based on contract, book account, *quantum meruit* and reasonable value of services. The complaint should allege and attach the retainer agreement signed by the client and attorney, the pre-action notice with proof of service and the statements sent to the client for services rendered and the failure of the client to make payment. Depending on the amount of fees owed, the complaint should be filed in either the New Jersey Superior Court, Law Division or Special Civil Part.

***Fee Arbitration***

Rule 1:20A-3 governs fee arbitration proceedings with the client. If a collection action has been filed or a fee hearing ordered on an attorney lien application, the filing of a fee arbitration by the client *stays* the collection proceedings until there is a fee determination.[40] The lawyer has the obligation to notify the court of the stay pending the outcome of the fee arbitration.

Fee arbitration determinations are binding on the client and the attorney, and once the proceedings have commenced it is the sole forum to determine the reasonableness of the fee.[41] All fee arbitration proceedings are confidential.[42] There are limited grounds for appeal of a fee arbitration award. All appeals are made to the Disciplinary Review Board.[43] No court has jurisdiction to review the fee arbitration determination.[44]

Rule 1:20A-3(e) governs the enforcement of a fee arbitration award. If the fee determination by the committee is not paid within 30 days, the amount may be entered as a judgment in the collection suit (that was stayed) or by a summary action pursuant to Rule 4:67 to obtain a judgment in the amount of the fee award.

If the court in the underlying action entered an order for the attorney charging lien, then the order to show cause for entry of a judgment in the amount of the fee award should be filed with that court in a summary fashion. If a collection action was filed and stayed by the fee arbitration, a motion for summary judgment should be filed in the collection suit to enter judgment. If no prior proceedings were filed and stayed by the fee arbitration, then a summary action by way of order to show cause and complaint pursuant to Rule 4:67 should be filed with the court to enter judgment in the amount of the award.

Once judgment has been entered, it should be docketed with the New Jersey Superior Court in Trenton as a statewide lien/judgment, and the attorney should utilize all remedies to collect the judgment, such as a writ of execution on assets or wage garnishment, to name two.[45] Once the judgment is entered, post-judgment interest will accrue on the amount owed until paid.[46]

When the judgment is paid by the client, a warrant to satisfy the judgment must be provided by the lawyer. ⚖

## Endnotes

1. RPC 1.16.
2. RPC 1.2(c).
3. *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003), *certif. denied*, 177 N.J. 233 (2003).
4. *Id.*
5. RPC 1.5; R. 5:3-5; R. 1:21-7.
6. *Lerner*, 359 N.J. Super. 201 (App. Div. 2003), *certif. denied*, 177 N.J. 233 (2003).
7. RPC 1.5.
8. RPC 1.5(a) A lawyer's fee shall be reasonable. 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 services properly;
   (2) the likelihood, if apparent to the client, that the acceptance of a 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;
   (8) whether the fee is fixed or contingent.
9. RPC 7.1(a)(4)(i).
10. RPC 1.5; R. 1:21-7.
11. R. 5:3-5.
12. RPC 1.5(d).
13. R. 1:21-7.
14. R. 1:21-7(c).
15. RPC 1.5(c).
16. RPC 1.5(c).

17. RPC 1.5(e).
18. RPC 5.4.
19. R. 4:42-8.
20. ABA Model Rules of Professional Conduct 1.5(a) (2000).
21. *See Scullen v. State Farm Ins. Co.*, 345 N.J. Super. 431, 441-42 (App. Div. 2001).
22. R. 5:3-5(a).
23. Sylvia Pressler and Peter Verniero, Current N.J. Court Rules (Gann 2011), Appendix XVIII, p 2601.
24. R. 5:3-5(a)(1) through (10).
25. This is a good practice for any hourly rate retention when providing legal services. It allows the client to see the services rendered, the costs and expenses incurred and increases regular cash flow to the lawyer.
26. RPC 1.8; R. 5:3-5(b).
27. R. 5:3-5(b).
28. R. 5:3-5(b).
29. RPC 1.8(h).
30. RPC 1.8(i).
31. N.J.S.A. 2A:13-5 and 2A:13-6.
32. RPC 1.5.
33. R. 4:42-9; R.5:3-5(c).
34. RPC 1.16; R. 5:3-5.
35. R. 1:21-6(c).
36. R. 5:3-5(c).
37. R. 1:20A-6.
38. R. 1:20A-6.
39. R. 1:20A-6.
40. R. 1:20A-3(a).
41. R. 1:20A-3.
42. R. 1:20A-5.
43. R. 1:20A-3(d).
44. R. 1:20A-3(e).
45. R. 4:56.
46. R. 4:42-11.

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