

# **Ethical Fee Agreements and Billing: Tips to Avoid Traps for the Unwary**

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As lawyers, we strive to provide appropriate and ethical advice to our clients; however, our fee agreements and client billing procedures must comply with the Bar Rules as well. This article will provide information and tips regarding ethical fee agreements and billing procedures.

Typical fee arrangements include charged billable hours, non-refundable fee retainers which are earned upon receipt, set or flat fees which are earned upon receipt, and contingent fee agreements. Fees and fee agreements in Florida are primarily addressed in Bar Rule 4-1.5 and a detailed discussion of the requirements of this and other Bar Rules is beyond the scope of this article. The following are some brief comments and tips to avoid ethical issues and problems related to fees.

If the fee agreement provides for billable hours, the lawyer should keep detailed entries and records of the billable time and it is also recommended that monthly billing invoices be sent to the client detailing the charged time (and any costs). The client should also be given a specific period of time to review the billing invoice and state any issues with the billing invoice.

The Bar Rules do not address time that may appropriately be billed to the client except that the fee should be reasonable and cannot be illegal, prohibited, or clearly excessive. It is recommended that billable hours result from substantive activities by a lawyer or trained non-lawyer which provide value to the client. This excludes clerical, secretarial, or other non-substantive activities but would include summarizing deposition and hearing/trial transcripts, if such summaries and other activities provide value to the client.

If the fee agreement provides for a set or non-refundable fee, the fee agreement must be in writing and should state clearly that the fees are earned upon receipt. In addition, all set and non-refundable fees that are earned upon receipt must be placed into the lawyer's operating account, not the trust account.

In Florida Bar Ethics Opinion 93-2, the Professional Ethics Committee opined that non-refundable fees are ethical; however, the opinion cautions that "(i)f the lawyer performs no legal services, obtains no benefits for the client, and has not lost other employment opportunities as a result of agreeing to represent the client...the lawyer...may be guilty of charging an excessive fee if no part of it was refunded."

Even if the fee is non-refundable, it is recommended that the lawyer provide the client with billing invoices detailing the time and costs incurred. The client should be given a specific period of time to review the invoice and state any comments or concerns. Although not required, monthly invoices may prove invaluable if there is a dispute over the billing and/or if a Bar complaint or lawsuit is filed.

If the fee is contingent (such as in a personal injury matter), the fee agreement must be in writing and must also comply with all of the requirements of Bar Rule 4-1.5. If the fee will be divided between lawyers and/or firms, the Bar Rules require that this division be disclosed to the client in writing and comply with other conditions, including that the fee agreement be signed by the referring and referral lawyers (or co-counsel).

If the representation is for a personal injury or wrongful death matter, the Bar Rules also restrict the percentage of fees that the lawyer can recover and require that the client review and execute a statement of client's rights. All settlement proceeds must be placed into the lawyer's IOTA trust account and accounted for in the closing statement, which must also be reviewed and signed.

The lawyer may provide letters of protection to medical and other providers. Letters of protection constitute the lawyer's assurance that the provider's billings will be protected upon settlement or disposition of the matter. Under Bar Rule 5-1.1(e), the lawyer must promptly notify the client or third persons who have an interest of the receipt of settlement funds. The letter of protection provides notice to the lawyer that the provider(s) have an interest in the settlement proceeds.

If there are insufficient funds to pay all providers and there is a dispute over which providers should be paid, Rule 5-1.1(f) provides that funds in dispute must remain in trust until the dispute is resolved (or placed into the registry of the court if the lawyer is unable to resolve the dispute).

I hope you found this short review of the Bar Rules related to fees helpful and be careful out there!

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