



Contingent Fees

A proposal
regarding personal injury
and wrongful death cases

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Some practitioners may not be aware of the State Bar Ethics Committee's proposed recommendations concerning changes in the ethics law relating to contingent fees. The purpose of this article is to inform those individuals.

Signed by the Client

While the existing MRPC 1.5 already requires that all contingent fee arrangements be in writing, the new proposal removes any doubt for the need to have the client's signature in writing by expressly stating "a contingent fee agreement shall be in writing signed by the client," Rule 1.5(c). Because a written fee agreement reduces the possibility of a future misunderstanding, the basis or rate of all fees must be communicated to the client, *preferably in writing*. Additionally, Rule 1.5(a) would require that all expenses as well as fees be reasonable in the amount and communicated to the client before or within a reasonable time after commencing the representation, except when the firm will charge a regularly represented client on the same basis. "Reasonable" is a defined term and denotes the conduct (or understanding) of a reasonably prudent and competent lawyer, Rule 1.0(h). Any change in rate of fees or expenses must also be communicated to the client, Rule 1.5(b).

Excessive Fee

A lawyer shall not charge or collect a clearly excessive fee in any matter, contingent or otherwise. There is no recommended change in the eight enumerated factors lawyers must consider in determining the reasonableness of a fee. However, the comment to Rule 1.5 explains that the numbered factors are not exclusive and not all of the factors are relevant to every fee. Moreover, there is no suggestion in proposed Rule 1.5 or the comment thereto that requires a lawyer to offer the client an alternative fee structure. In case there is any doubt, Rule 1.5(a), as proposed, clarifies the point that charging an excessive unreasonable fee, including costs, is a disciplinable offense.

Calculation of Fee Amount

MCR 8.121 currently caps a lawyer's contingent fee at one-third of the *net* recovery in all claims or actions for personal injury or wrongful death by declaring that the receipt, retention, or sharing of fees in excess of one-third of the net recovery is deemed clearly excessive whereas an amount equal to or less than one-third of the net recovery is considered fair and reasonable. Significantly, new Rule 1.5(a) provides for the deduction of expenses advanced either *before or after* the contingent fee is calculated. If this Rule is adopted by the Michigan Supreme Court, some accommodation will have to be made in the Michigan Court Rules.

A Division of Fees Among Lawyers Not in the Same Firm

A division of a fee is a single billing to a client covering the compensation of two or more lawyers who are not in the same law firm. Here, the client must agree to the sharing arrangement and the agreement must be *confirmed in writing*. "Confirmed in writing" is a defined term in the proposed Rules that means informed consent that is given in writing by the person (client) or a writing that a lawyer promptly transmits to the person confirming an oral informed consent, Rule 1.0(b). Obviously, the total fee charged the client must be reasonable.

Fees Paid in Property Business Transactions with Clients

Since a fee paid to a lawyer in property rather than money may be considered a business transaction with a client, the lawyer is wise to obtain the client's informed consent, *in writing signed by the client* to all essential terms of the deal and advise the client in writing of the desirability of seeking the advice of independent legal counsel before proceeding with the transaction. Thus, when a lawyer is willing to accept a percentage of the business in payment of fees for entity organizational service, the lawyer should comply with all provisions of proposed MRPC 1.8(a). ♦

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