

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-2**

[This opinion was originally issued by the Committee on November 15, 2005. The Committee has now determined that this opinion should be published as a Formal Opinion.]

MAY AN ATTORNEY DURING THE COURSE OF HIS IMMIGRATION PRACTICE CHARGE A FLAT FEE WHEN A CLIENT REQUESTS REPRESENTATION IN A REMOVAL PROCEEDING? QUESTION PRESENTED SHOULD ALL OR PART OF A FLAT FEE GO INTO A LAWYERS TRUST ACCOUNT?

RESTATEMENT OF FACTS

An attorney who is in private practice states that during the course of his immigration practice flat fees are charged when a client requests representation in a removal proceeding. Removal proceedings take an average of 2-3 years and the flat fee for this representation is \$4,000.00 for any and all services rendered. At the outset 50% of the money is due and payable upfront. The remaining balance will be paid in monthly installments of \$200.00 per month until fully paid. The fee agreement also states that the initial 50% deposit is not refundable. In addition if there is any dispute regarding legal fees or the attorney is relieved of representation an accounting will be provided and any unused funds would be reimbursed to the client.

STATEMENT OF ISSUES

The question presented is "Should all or part of the flat fee go into the lawyers trust account?" In addition, if the firm does not bill by the hour which is customary for immigration lawyers, how can fee disputes be resolved properly?

STATEMENT OF APPLICABLE CANONS, ETHICAL CONSIDERATIONS AND DISCIPLINARY RULES

RULE 1.5 (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) 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, 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) Upon reasonable and timely request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:

(1) Itemization of all hourly charges, costs, interest assessments, and past due balances.

(2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

DISCUSSION

The topic of flat fees and where to deposit them has been the subject of much debate in many jurisdictions over a lengthy period of time. We can not say with any certainty that there is an even split among the jurisdictions consulted. However, we can say definitely that there is a split of opinion on this issue. Some jurisdictions take the position that flat fees are property of the lawyer upon payment and do not need to be deposited into the lawyer's trust account. In Nebraska flat fees in criminal cases have always been permitted and the fee is considered earned upon payment. The funds may be deposited into the attorney's regular business account and considered income. Preferably a written fee agreement outlining these facts would be sent to the client. Immigration proceedings involving representing clients who will possibly be removed from the United States could certainly be considered quasi criminal. Utilizing half of the fee as a flat fee would certainly be reasonable and the Committee agrees that it would be ethical under current guidelines. The initial payment of (\$2,000.00) could be deposited in your business account and considered earned when paid.

The second issue regarding how fee disputes should be resolved when no hourly fee is quoted is a little more complicated. Your contract states that if there is any fee dispute an accounting would be provided and any unused funds would be reimbursed. A log is kept of all work completed with specific dates and times of completion. However, your firm does not do work on an hourly basis. Since you are providing the client with a fee agreement at the time representation is accepted the Committee feels that an hourly rate should be inserted into the contract. This would comply with Rule 1.5 (f)(1) and (2). A simple calculation could be provided to the client in the event an accounting was requested.

CONCLUSION

The code of professional responsibility adopted by the Nebraska Supreme Court does not prohibit collecting a flat fee and placing it into the attorney's regular business account as income. As long as the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible is communicated to the client, preferably in writing, the Committee does not disapprove of charging a flat fee. The Committee feels any remaining fees to be earned should be based on the attorney's hourly rate which should be communicated preferably in writing to the client.

Very truly yours,
THE ADVISORY COMMITTEE

Michael J. Mooney

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