

Matthew T. Norman



IOLTA Considerations for Criminal Defense Attorneys Who Accept Flat Fees

This article is the second in a two-part series addressing fee issues unique to the criminal defense attorney. The first part addressed what is a “reasonable fee” under the Rules of Professional Conduct. This article will address flat fee arrangements in criminal representation and IOLTA considerations.

From the client’s perspective, flat or fixed fees allow the client to control costs, create a budget, and avoid the uncertainty of the hourly rate. From the defense lawyer’s perspective, flat fees encourage efficiency and are normally paid up front. The “dilemma” is where the flat fee should be deposited prior to performing any representation, including attendance at an arraignment or initial appearance. The answer is the funds should be placed in an IOLTA account, although there is some authority to the contrary. The other consideration a defense attorney must think about is: when is it appropriate to move a flat fee from an IOLTA account to an operating account?

I. Where should you initially deposit your flat fee in a criminal case?

Rule 1.15(c) provides that a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. Thus, it seems clear that if your client, charged with DUI, comes to your initial consultation with a check for your \$1,500 flat fee that you must deposit the entire check in your IOLTA account. However, Board Op. 96-4 has been relied upon as authority for placing a flat fee into an operating account. The Board’s Advisory Opinion 96-4, states in pertinent part:

In this Board’s view, DR 9-102(A) does

not require that flat fees paid in advance of representation in a criminal matter be placed in a trust account. A flat fee for representation in a matter may be placed into the attorney’s business account upon receipt, based upon the agreement between the lawyer and client that the fee will be paid in advance of representation. By agreement, the funds are given to the lawyer in exchange for the promise to represent the client in the matter.

This advisory opinion by the Supreme Court of Ohio was issued prior to the adoption of the Ohio Rules of Professional Conduct and should be relied upon with extreme caution. Comment 6A to Rule 1.5, which addresses fees and expenses, is instructive as to flat fees and states:

A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed ... When a fee is earned affects whether it must be placed in the attorney’s trust account, see Rule 1.15.

Comment 6A further instructs that in order to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis. Therefore, you should diligently keep track of your time spent preparing discovery requests, reviewing the prosecutor’s responses and talking with police officers, even though your client has already paid your flat fee for his DUI representation in full.

Despite Advisory Opinion 96-4, which could be detrimentally relied on, it is important to place a client’s flat fee in an IOLTA account upon

receipt. Otherwise, there may be a violation of Rule 1.15(a) and (c).

The next question is, when can an attorney move a flat fee out of an IOLTA account?

II. When can you move flat fee funds from an IOLTA account to an operating account when handling a criminal matter?

Disciplinary Counsel, Jonathan E. Coughlan, says the answer is “fluid” and utmost precaution should be used when immediately placing a flat fee into an operating account. Although he acknowledges that Advisory Opinion 96-4 has not been withdrawn, this Board Opinion is not dispositive of the issue. Mr. Coughlan observes that the IOLTA dilemma in connection with a criminal defense attorney’s flat fee is a hot issue right now in Ohio. Based on the Supreme Court of Ohio’s opinion last year in *Disciplinary Counsel v. Summers*, 131 Ohio St.3d 467, 2012-Ohio-1144 and the Court’s recent opinion in *Disciplinary Counsel v. Squire*, 130 Ohio St.3d 368, 2011-Ohio-5578, a strict approach has been taken for interpreting the Rules of Professional Conduct applicable to managing flat fees. The Court suspended both attorneys because they mishandled the flat fee paid by their respective clients. What is clear is that based on Rule 1.15(c), a flat fee is not earned until work is performed. Therefore, placing unearned fees in an operating account is not advisable.

In *Disciplinary Counsel v. Summers*, the attorney accepted a flat fee for criminal representation, subsequently withdrew from representation without securing a plea agreement, and attempted to resort to a mathematical formula of his hourly rate to justify keeping his flat fee, which he characterized as non-refundable. The problem that attorneys face when terminated early after accepting a flat fee, according to Mr. Coughlan, is that some assume that if they look back on their time records they can multiply the time spent by their hourly rate and come up with a figure to easily justify keeping a portion of the flat fee already accepted. This does not work

though, because as Mr. Coughlan points out, the “reasonableness” of a fee is determined by *all* of the factors discussed in Rule 1.5(a). The amount of time spent providing services to a client is only one of the factors to consider. Other factors such as, whether acceptance of the particular employment precludes other employment, the time limitations imposed by the client, the reputation and experience of the attorney, and the novelty and difficulty of the questions involved, all will be determinative. If a lawyer withdraws or is terminated prior to the work being completed, the client may be entitled to a refund under Rule 1.5(a).

So, hypothetically, if your new client charged with his first DUI walks into your office with your flat fee of \$1,500, where can you deposit your client’s check? The safest place is your trust account. When can you move funds from your IOLTA to your operating account? One approach that Jonathan Coughlan agrees with is to then use “benchmarks” for identifying when these funds can be withdrawn. In this example, the defense attorney who accepts a

flat fee of \$1,500 for a DUI, could withdraw specified amounts from his IOLTA account when benchmarks such as, arraignment (\$200), pretrials and discovery (\$300), trial prep and trial (\$800), and sentencing (\$200), are reached. Mr. Coughlan points out that utilization of this “benchmark” approach is only suggestive and certainly not required in Ohio right now. However, it is one method to consider — especially as criminal defense attorneys’ handling of flat fees continues to be highly scrutinized in Ohio.

Matthew T. Norman joined Gallagher Sharp as an Associate in 2006 after a successful career as an Assistant Prosecutor for both the city and county government. He has significant trial experience prosecuting felony offenses. He currently defends professional negligence claims, primarily focusing on attorney malpractice and claims alleging errors and omissions by real estate professionals. He can be reached at (216) 696-5037 or mnorman@gallaghersharp.com.