

Matthew T. Norman



## Fee Agreements With Criminal Defendants?

It Does Happen And Here Is What Your Client Should Know About Them...

**Y**our client who ended up in prison no longer wants to pay your outstanding fee. Your client's mother believes you are not adequately representing her son's interests and disputes your invoice. Your client now claims you are conspiring with the government, terminates you and owes thousands of dollars in legal bills. Does any of this sound familiar? This article is Part 1 of 2 which will address fee issues unique to the criminal defense attorney. Part 1 will address the Rules of Professional Conduct and discuss what is a "reasonable fee." Part 2, in next month's edition, will address IOLTA considerations for criminal defense lawyers.

Under the Ohio Rules of Professional Conduct, there are very specific factors which assist in formulating a reasonable fee. For the criminal defense practitioner, these "reasonable fee factors" can help your client understand the basis upon which you calculate your fee, whether it is based on an hourly or flat rate. Your client's understanding of how your fee is derived may help eliminate a future fee dispute.

### I. ESTABLISHING A REASONABLE FEE THAT YOUR CLIENT UNDERSTANDS

Rule 1.5 provides that a lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. Rule 1.5 offers specific factors to consider in determining whether the fee is "reasonable." A review of the factors to be considered in determining the reasonableness

of a fee makes one thing clear: your hourly rate or flat fee can differ depending on the circumstances of the client and the client's particular case.

There are eight "reasonable fee" factors contained in Rule 1.5(a) and they are discussed in turn.

#### 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

The first factor permits your fee to be higher when representing a client charged with a complicated drug trafficking conspiracy involving multiple co-defendants and several informants, as compared to your fee when representing a client charged with drug possession after a routine traffic stop. The complexity of a case often justifies a higher fee.

#### 2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

If you are hired to represent one of the alleged masterminds behind the largest mortgage fraud conspiracy case in the history of the State of Ohio charged with over 400 counts in both state and federal court, in order to fulfill your obligations to this client you likely will need to stop accepting new appointments and shut down part of your practice. Therefore, it is reasonable to factor into your fee with this client the fact that his representation will preclude you from taking on other new clients.

#### 3. The fee customarily charged in the locality for similar legal services.

You can derive your fee, in part, based on the amount that others normally charge a defendant for the same type of crime in the same jurisdiction. For example, your flat fee for a DUI may be more or less depending on the particular court it is assigned.

#### 4. The amount involved and the results obtained.

If you obtain a favorable outcome for your client and the client later challenges your fee via a fee dispute or grievance, the good result will certainly be a factor in your favor.

#### 5. The time limitations imposed by the client or by the circumstances.

If your client decides to hire you two days before trial or two days before his direct appeal is due, it is permissible to charge a higher rate given the time restriction. Under these circumstances, explain to your client why your fee is higher than normal.

#### 6. The nature and length of the professional relationship with the client.

When you sit down with your new client, talk to him about how long you think it will take to achieve his objective. If his case is assigned to a judge with a backlog of trials already scheduled during the next six months, and your new client knows he wants a trial, then you need to make sure your client understands that the extended length of your expected engagement may factor into your fee.

#### 7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

Yes, you can factor your reputation into the amount you charge. If you are fresh out of law school and representing a client charged with misdemeanor assault it may not be reasonable for you to charge the same amount as the seasoned attorney who accepts a similar case.

## 8. Whether the fee is fixed or contingent.

For the criminal defense attorney this factor is generally not applicable. Rule 1.5(d)(2) indicates that “[a] lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.”

Following these factors will help you avoid future misunderstandings over your fee with your client. The following case study illustrates how things can go wrong.

## II. CASE STUDY: *DISCIPLINARY COUNSEL V. SUMMERS*, 131 OHIO ST.3D 467, 2012-OHIO-1144

In *Summers*, the attorney’s client was 19 years old when he was charged with multiple felony offenses for allegedly assaulting a police officer during a brawl in the stands at a Cleveland Indians game. The attorney and the client’s family executed the attorney’s first fee agreement around the time of the client’s arraignment. The attorney secured an advance of \$1,000 for expenses and a retainer of \$2,500 from the family. The attorney also agreed to reduce his hourly rate from \$350 per hour to \$250 per hour. When the attorney’s first invoice went out, the family discovered that the attorney’s retainer fee had been exhausted and that they were being billed at the attorney’s regular \$350 per hour rate. They also discovered they were being billed at the rate of \$125 for work performed by one of the attorney’s summer associates. Apparently, the family was also being charged a reduced rate for the summer associate who the attorney explained normally charged \$175 per hour. The family did not pay this invoice.

Despite the billing discrepancies, the attorney continued working on behalf of his client. However, a week before a pretrial hearing, the attorney informed the client he was in breach of the fee agreement and he threatened

to withdraw unless a new fee agreement was secured. The attorney was upset with his client’s family claiming they were interfering with his representation of their son. The client was scared to death at the thought of losing his attorney. The family could not afford to retain new counsel.

The family then agreed to a new fee agreement with the attorney. This time they agreed upon a “flat fee.” The agreement specified that the family would pay the attorney \$15,000 — in addition to any and all amounts already paid. The flat fee agreement provided that the \$15,000 was all the client and his family would owe regardless of the time spent on the matter, even through trial and sentencing if necessary. The fee agreement characterized the \$15,000 as non-refundable and did not advise the family or the client that they might be entitled to a refund of all or part of the fee if the attorney failed to complete the representation.

Four months later, after collecting over \$17,000 in fees, the attorney called the client and discussed a plea bargain because the case was not going well. The next month the attorney got into a shouting match with the client’s father, told him he was “done,” and abruptly ended the representation. The attorney moved to withdraw without securing a plea agreement or otherwise finishing representation.

The Supreme Court of Ohio suspended Mr. Summers for six months. The Court found that the attorney violated R. 1.5(d)(3) (prohibiting a lawyer from charging a flat fee without simultaneously advising the client in writing that the client may be entitled to a refund of all or part of the fee if the lawyer does not complete the representation); R.1.5(a) (prohibiting a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee) and also R. 1.16(a) (requiring a lawyer to promptly refund any unearned fee upon the lawyer’s withdrawal from employment).

The Court examined the factors set forth in R. 1.5(a). It recognized that this attorney had considerable experience, a good reputation and obvious ability, and that these were factors to consider in establishing a reasonable fee. However, the Court explained:

When a lawyer agrees to represent a client through the conclusion of a case for a flat fee, and that lawyer withdraws from representation without cause before the work is completed, he CANNOT retain the entire flat fee by resorting to a mathematical calculation of his billable hours. To hold otherwise would leave clients at the mercy of lawyers who charge significant flat fees to provide complete representation only to withdraw when the demands of the case become too onerous. [Emphasis added.]

One final important point the Supreme Court established: if the Court views the client as “vulnerable,” (it did here because the client was from out of state, had little means, social-anxiety disorder, and no prior knowledge of the criminal justice system), the Court is likely to more rigorously review whether a fee is excessive.

Your client’s informed understanding of how you arrive at your hourly or flat fee is extremely important. In next month’s edition, I will discuss IOLTA considerations unique to the criminal defense attorney’s practice.

---

*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.*