

Ethics: Overview Part 1

Agenda

- Fee Agreements
 - Contingency Fee Agreements
 - Flat fees, fixed fees, and retainers
 - Charging Interest
- Fee Sharing
- Joint Representation
- File Retention
- Asserting Liens on Client Property
- Advertising

Ethics and Fee Agreements

“Think of your fee agreement as more than the monetary terms. If done well, it will likely be your best defense if you or your work is ever challenged.”

-Travis Pickens, OBA Ethics Counsel (2010)

Contingency Fee Agreements

- Maximum fee
 - “...not to exceed fifty percent (50%) of the net amount of such judgement as may be recovered, or such compromise as may be made...” Title 5 O.S. § 7

Contingency Fee Agreements

- Must be in writing and signed by the client
 - ORPC Rule 1.5(c)
 - Failure to reduce to writing is a factor in disciplinary proceeding
 - *State of Oklahoma ex rel. OBA v. Mayes*, 1999 OK 9

Contingency Fee Agreements

- Prohibited in certain types of cases
 - Divorce (continued)
 - The law discourages divorce and contingent fee would give an attorney an interest in securing a divorce, thus preventing reconciliation
 - The property rights are merely incidental to dissolution, so not a cause of action “ex contractu” or “ex delicto”

Contingency Fee Agreements

- Prohibited in certain types of cases
 - Divorce (continued)
 - An enhanced fee based on results obtained is also unethical, unenforceable, and may subject a lawyer to discipline
 - *State of Oklahoma, ex. rel., OBA v. Fagin*, 1992 OK

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Contingency Fee Agreements

- Prohibited in certain types of cases
 - Divorce (continued)
 - Note: prohibition does not apply to post-judgement actions to recover for support, alimony or other financial orders
 - Criminal cases
 - ORPC 1.5(d)(2)

Contingency Fee Agreements

- Expenses (ORPC 1.5)
 - “A contingent fee agreement...shall state...expenses to be deducted from the recovery...”
 - “...whether such expenses are to be deducted before or after the...fee is calculated.”
 - “...must clearly notify the client of any expenses for which the client will be liable [if not successful in the case].”

Contingency Fee Agreements

- Court-awarded fees
 - Must be unambiguously provided for in fee agreement to include in amount that contingency fee is based upon
 - Default rule is greater of...
 - $(\text{total recover} - \text{court-awarded fees}) * \text{contingency \%} = \text{fee}$; or
 - court-awarded fee
 - *State of Oklahoma, ex. rel., OBA v. Weeks*, 1998 OK 83

Contingency Fee Agreements

- Court-awarded fees (continued)
 - A lawyer may not agree to indemnify her client against attorneys fees and costs awarded against the client
 - ORPC Rule 1.8(e)
 - OBA Legal Ethics Opinion No. 323

Contingency Fee Agreements

- Witnesses and experts
 - May not be employed on a contingency fee basis
 - ORPC Rule 5.4
 - OBA Legal Ethics Opinion Nos. 69 and 103

Contingency Fee Agreements

- “Med pay”
 - There is no absolute prohibition on earning a fee based on medical payments made to a client by their own insurer...HOWEVER
 - Were the payments made without dispute?
 - If so, probably excessive and exorbitant (a/k/a unreasonable)
 - OBA Legal Ethics Opinion No. 306

Contingency Fee Agreements

- Attorney is discharged (without cause) or withdraws
 - “If an attorney is discharged without cause, the lawyer working on a contingent fee basis is entitled to receive for his services a proportionate share of any contingent fee fund eventually created.”
 - *Martin v. Buckman*, 1994 OK CIV APP 89

Contingency Fee Agreements

- Attorney is discharged (with cause)
 - “...termination was for ‘just cause,’ but there is no controlling authority that would preclude [discharged lawyer] from recovering a portion of the fees...”
 - *Duffy v. Cope*, 2000 OK CIV APP 140

Charging Clients Interest

- “...it is ethical and proper for an attorney to charge interest on overdue accounts...as long as there has been an agreement made with the client concerning these charges”
 - OBA Legal Ethics Opinion No. 286
- Beware, however, Federal Debt Collection Practices Act, etc.

Flat Fees, Fixed Fees, and Retainers

- Regardless what you call it, the fee belongs to the client until it is earned.
- OPRC Rule 1.15(a) requires and OBA Office of Ethics Counsel advises...
 - Deposit in your trust account.
 - Transfer to your operating account in increments *as work is done*.

Flat Fees, Fixed Fees, and Retainers

- “Nonrefundable”
 - The use of the term, “to represent an advance payment of fees for legal services the attorney will perform in the future is impermissible...The fees are not ‘nonrefundable’ because if the attorney withdraws or is terminated before completing the work, the attorney must refund the unearned portion of the advance.”
 - *State of Oklahoma, ex rel., OBA v. Weigel*, 2014 OK 4

Flat Fees, Fixed Fees, and Retainers

- “Nonrefundable” (continued)
 - However...availability fees are allowed so long as they are intended to guarantee the attorney’s availability and not intended to pay for future services.
 - OBA Legal Ethics Opinion No. 317

Flat Fees, Fixed Fees, and Retainers

- “Nonrefundable” (continued)
 - Factors to consider in setting “availability fee”
 - Income sacrificed by accepting engagement
 - Reputation of the lawyer
 - Fee agreement should be in writing and the terms adequately explained to the client

Fee Sharing

- A division of fees between *lawyers not in the same firm* is only allowed if...
 - The division is proportionate to the services performed OR each lawyer assumes joint responsibility for the representation; and
 - The client agrees to the arrangement in writing
 - ORPC Rule 1.5(e)

Fee Sharing

- ...joint responsibility for the representation
 - Equivalent to being in a 'supervisory capacity' and responsible for the other lawyer's work
 - Includes financial and ethical responsibility as if the lawyers were associated in a partnership

Joint Representation

- Problem areas
 - Business entities with multiple owners
 - Employer and employee
 - Heirs and beneficiaries in probate or trust administration
- Clearly identify the client being represented
- Include an appropriate conflict waiver

File Retention

- Trust account records and all records regarding client property must be kept for five (5) years
 - ORPC Rule 1.15(a)
- Otherwise, the ORPC do not provide specific guidance on file retention

File Retention

- Holding client property (e.g., a file) to coerce payment
 - Retaining liens and charging liens
 - Cannot be asserted against property being held for a specific purpose
 - Medical payments held in escrow
 - Deed held in escrow for a closing

File Retention

- Holding client property (e.g., a file) to coerce payment

(continued)

- Balance with ethical responsibility not to harm the client
 - Does it prejudice client's ability to move forward?
 - Are the claimed fees reasonable and for completed work?
- Never refuse to file or furnish a pleading until payment is received
 - OBA Legal Ethics Opinion No. 234

Advertising

- The Rules governing advertising
 - ORPC Rule 7.1
 - No false and misleading communication
 - Including omission of a necessary fact
 - Including literally true but nonetheless misleading

Advertising

- The Rules governing advertising
 - ORPC Rule 7.2
 - No paid recommendations except
 - Reasonable costs of permissible advertising
 - Usual charges of a legal service plan or qualified lawyer referral service
 - Referral agreements allowed by the ORPC and disclosed to the client

Advertising

- The Rules governing advertising
 - ORPC Rule 7.3
 - No in-person, live, telephone or real-time electronic solicitation
 - Solicitation is a targeted communication to a specific person
 - Exceptions for soliciting other lawyers, family members, close friends, and former clients

Advertising

- The Rules governing advertising
 - ORPC Rule 7.4
 - May communicate “certification” as a specialist in patent and trademark law
 - May communicate “certification” as a specialist in a particular field by the licensing authority of a state where admitted with the qualification that the certification is not recognized in Oklahoma

Advertising

- The Rules governing advertising
 - ORPC Rule 7.5
 - Firm name and letterhead must not be false or misleading
 - Trade name may be used if it does not imply an improper connection to a government agency or a non-profit organization
 - Name of a public office holder may not be used in the name of the firm during any “substantial period in which the lawyer is not actively and regularly practicing”

Recap

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