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*See page 12 – 13 for registration details!*

# **CRIMINAL DEFENSE CORNER**

## **GETTING PAID WITHOUT BREAKING THE RULES**

*By John R. Murphy*

"Getting paid" ranks just below "arguing the case successfully before the United States Supreme Court" on most attorneys' lists of things they hope will come from a representation. Toward that end, most attorneys try to draft ethical, enforceable fee agreements that clearly spell out the client's financial responsibilities. And then they pray.

Criminal defense attorneys face unique challenges when it comes to getting paid and drafting fee agreements. First, notwithstanding our best efforts, our clients are frequently sent away to places that don't permit them to work other than in the not too lucrative field of license plate manufacturing.

Second, criminal cases move very fast, and the clients almost always come to us when the wheels of justice have already begun moving in their direction. A criminal defense attorney is likely to have to make a court appearance or file a bond modification notice within hours or days of being contacted by a client. If the attorney doesn't take these steps because the client doesn't have the full retainer in hand, the attorney may not be able to protect the client's interests. If the attorney takes these steps without getting the retainer up front, and the client

is unable to raise the funds later, the attorney may be stuck handling the case pro bono. Long ago a seasoned circuit court judge listened to my tale of woe when a client failed to come up with some promised payments towards the retainer. He then slyly smiled at me and said, "Well, counsel, you might have thought about all that before you took the case." For some reason I didn't experience the satisfaction of doing pro bono work during the remainder of that representation.

To help the new practitioner, or the practitioner new to criminal defense, figure out how to get paid, below is a brief summary of the issues and rules relating to fee arrangements and agreements in the world of criminal defense.

### **Fees and Agreements: Generally**

There isn't much case law on this topic. The authorities are the Rules of Professional Conduct [hereinafter "Rules" or "Rule"] ([www.sdbar.org/Rules](http://www.sdbar.org/Rules)), and the State Bar of South Dakota's Ethics Opinions [hereinafter "Ethics Op."] ([www.sdbar.org/Ethics/Opinions](http://www.sdbar.org/Ethics/Opinions)).

All fee discussions begin with Rule 1.5, which states that fees and fee agreements must be reasonable. Rule 1.5

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also sets forth a multitude of factors to be considered when determining whether a particular fee is reasonable. Rule 1.5(a). Reasonableness applies to an individual attorney's fees and to a collective fee if multiple attorneys work on the same case: both the individual and the collective fee must be reasonable. Rule 1.5(e)(3).

Written fee agreements are preferred, but not required, when one attorney is working on a case. Rule 1.5(b). If a written fee agreement is not used, at a minimum, some sort of memorandum of understanding should be provided to a client regarding fees and expenses. Rule 1.5 (comment 2). However, written fee agreements are mandatory when attorneys from different firms work together on a case or when fees are split among firms. Rule 1.5(e)(2).

Contingent fees are not allowed in criminal defense cases. Rule 1.5(d)(2).

#### **Flat, Fixed and Non-Refundable Fees**

Flat or fixed fee agreements are permissible in South Dakota for criminal defense work. Ethics Op. 2000-5A. However, lawyers utilizing flat or fixed fees are still subject to the reasonableness provisions contained in Rule 1.5(a). Even if a client enters into a flat fee agreement, the client has the right to review the fee at the conclusion of the representation to determine its reasonableness.

Ethics Op. 2000-5A. Further, a fee agreement may not be structured such that it unduly penalizes clients who decide to terminate a relationship with a lawyer. Ethics Op. 2000-5 & 5A.

In practice, this means that a lawyer using a flat or fixed fee agreement must still keep track of his or her time and expenses so that the client can review them to see if the total fee was reasonable in light of the time expended by the lawyer. See also Ethics Op. 95-16 (requiring attorney to provide itemized bill to demonstrate reasonableness of fee). It also means that a lawyer who received a flat fee at the commencement of a representation must be prepared to refund a portion of that fee if the client wants to terminate the relationship early on or if it would be unreasonable for the lawyer to keep the entire flat fee for the work actually performed.

Non-refundable retainer agreements are strongly discouraged. Ethics Op. 2000-5. Fee agreements, such as non-refundable retainer agreements, that do not provide for client review or the refund of unearned fees are likely to be considered invalid and unethical under Ethics Op. 2000-5.

#### **Segmented Flat Fee Agreements**

In some jurisdictions it is common for criminal defense attorneys to partition a case into segments, then enter

into agreements to represent a client for discrete sections of the case. For instance, an attorney may charge \$X for representing a client from the initial appearance through the preliminary hearing; \$Y from preliminary hearing through arraignment; etc.

This kind of representation raises ethical concerns and practical problems. Practically speaking, as mentioned earlier, a judge may not be inclined to let an attorney out of case just because the fee agreement was segmented. Once a case has gone past the early stages and is heading towards trial, a judge may have good reasons for not wanting the client to have to hire a new attorney who will need time to get up to speed just to accommodate the first attorney's fee agreement.

The ethical considerations are more significant. Rule 1.5 (comment 5) states that an attorney may not enter into an agreement that might induce the lawyer to curtail services at an inopportune time for the client, or when it is foreseeable that the client will need more extensive services than originally bargained for. In a criminal case, once a criminal complaint is served, it is likely that the case will continue until such time as the charges are dismissed, a plea agreement is reached, or the case is tried. Breaking the case into phases and ceasing a representation at a pre-determined point is almost certain to leave the client without representation at a critical time. This may put the client in the position of feeling as if he or she needs to bargain with the lawyer – who is now in a position of increased bargaining power – to get him or her to continue working on his case. This is precisely the ill that the rules seek to prevent. Rule 1.5(comment 5).

Another ethical issue raised by these types of fee agreements is the disincentive they create for doing investigation and research in a timely manner. If an attorney is only guaranteed compensation for representing a client during an early phase of a case, that attorney has little incentive to interview witnesses, visit the crime scene, and begin the process of researching potential legal issues that may benefit the client during a later phase. Instead, the lawyer will merely do what is necessary to protect the client's immediate interests. Yet, often the research and investigation that will most benefit the client in later stages of a case is best obtained early on when witnesses' memories are fresh and the crime scene still looks similar to the way it did on the date of the offense. Thus, if a segmented fee agreement is going to

be entered, the details and the risks should be well covered in the fee agreement.

### **Third Party Guarantors**

A third party may pay or guarantee a client's fee. Ethics Op. 2000-5; Rule 1.8(f). For a lawyer to accept third party payment, the client must consent, the third party cannot interfere with the lawyer's judgment or independence, and the lawyer cannot divulge protected information to the third party. Ethics Op. 2000-5.

In principle this appears pretty straightforward. In reality, it can be tricky, especially when the fee is guaranteed by parents or spouses. An attorney accepting a retainer or flat fee from a third party should make sure that the third party clearly understands that they aren't going to be able to get confidential information or guide the litigation just because they footed the bill. If the attorney uses detailed, itemized bills, not even the bill should go to the third party as the bill may contain protected information.

### **Detailed Legal Bills and Court Appointments**

A number of rules and ethics opinions encourage lawyers keep detailed track of the work done on behalf of a client. See e.g. Ethics Op. 2000-5A (lawyers must be able to establish reasonableness of fees); Ethics Op. 95-16 (requiring attorney to provide itemized bill to demonstrate reasonableness of fee). However, lawyers may not release details of a client's bill to an outside auditor, such as an insurance company, without the client's express consent. Ethics Op. 99-2.

The conclusion reached in Ethics Op. 99-2 also calls into question the amount of detail that an attorney can provide to a judge, county auditor or other administrator in support of a voucher for payment for a court appointment. Court appointed lawyers are encouraged to provide detailed bills to judges to avoid having their bill cut. A judge who doesn't know what you did on a case other than appear at a few hearings prior to dismissal of the case may not be inclined to pay your large bill until he or she understands that a tremendous amount of research and investigation went in to persuading the State to drop the charges.

However, clients may be reluctant to authorize the release of detailed billing itemizations to their judge. Defendants often feel that the judge is trying to put him or her in jail and may not want to share any information with the court. Further, the itemizations submitted by attorneys are not kept confidential. They are often forwarded on to the county auditor's office where they are kept with other bills, and where they can be accessed by other attorneys, including the prosecution.

There are no easy answers here. It is clear that an attorney should obtain their client's consent prior to submitting an itemized bill. It also appears reasonable to expect that attorneys redact all information from a bill that contains any confidential information or work product. Further, asking the court to place the itemized bill under seal in the court file, as opposed to having it attached to

the county voucher and being held by the auditor's office, doesn't appear to be unreasonable in these circumstances.

### **Referrals, Fee Splitting Agreements, and Legal Services Plans**

As a criminal defense attorney, I have received many calls from out-of-state legal services plans. Typically, the service plan asks if I will represent an out-of-state truck driver who was ticketed in South Dakota and who doesn't want to come back to fight it himself. The catch is that I am asked to accept a cap on fees or their plan's hourly rate, which is usually well below mine. I've also had numerous out-of-state attorneys contact me hoping to refer a client to me, but with the expectation that they would receive a finder's fee or a portion of the fees I receive from the client. The question is, are these arrangements okay under South Dakota law? The answer is, in most cases, no.

Referral fees are generally prohibited. Rule 7.2(d). A lawyer cannot give "anything of value" to another for recommending the lawyer's services. Rule 7.2(d). Thus, paying another attorney a finder's fee, or paying them a portion of your fee for a referral, is not permitted in the criminal law context.

Additionally, lawyers are generally prohibited from participating in for-profit legal service plans or client referral services. See Ethics Op. 98-10, 95-12 and 92-19. There are a number of reasons why participation in these services or plans are considered unethical. Lawyers are prohibited from giving "anything of value" for a referral. Many legal services plans require that the attorney accept a reduced hourly rate in order to get a referral, which constitutes the giving of something of value to the referral plan. Ethics Op. 95-12; Ethics Op. 92-19. Further, when attorneys pay a referral service to steer clients their way, they are paying a portion of the service's advertising costs, which is forbidden. Ethics Op. 98-10. The only referral plans that lawyers can participate in are authorized not-for-profit lawyer referral services. Rule 7.2(d)(2).

### **Unpaid Fees and Fee Disputes**

In the criminal defense world, no two cases are alike. An attorney's estimate of the total cost of a case is often merely an educated guess. What appears at first to be a straightforward drug possession case may later result in monumental search and seizure litigation. Motions granted in favor of the defense are often subject to intermediate appeal by the State. Unfortunately, clients often have a way of making a bad situation worse by violating a condition of their bond. With such variables, even with a well drafted fee agreement and a healthy retainer, lawyers often find themselves struggling to collect their fees. What can they do to get paid?

If a fee agreement sets forth a procedure such as arbitration for resolving fee disputes, an attorney is bound to abide by that condition. Rule 1.5 (comment 9). Even if

no such provision exists in the fee agreement, attorneys should consider submitting to such a process to resolve the dispute. Rule 1.5 (comment 9). Attorneys may use collection agencies to collect unpaid fees, and they may provide the collection agency with personal information about the client in order to facilitate the process. Ethics Op. 95-3 (citing to Rule 1.6(b)(2)). However, attorneys may not report clients to a credit bureau. Reporting a client is not an act necessary to establish a fee claim, it risks compromising confidentiality, and it is perceived as a punitive measure against the client. Ethics Op. 95-3 (citing to Ethics Op. 94-23).

Regardless of whether your client owes you money, you cannot refuse to give your client a copy of his or her file. Ethics Op. 95-16. This does not include the attorney's work product or originals, which the lawyer can keep for his or her own purposes.

### **Conclusion**

It's not easy getting and keeping clients and it's not easy getting paid. With a little preparation in advance, you should be able to put together a fee agreement that follows the rules, informs your clients of their obligations, and is enforceable if things don't work out.

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<sup>1</sup> These factors are: (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.