



Drafting Effective Engagement Letters

October 1, 2020

9:00 a.m. – 10:00 a.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credits (Ethics)

NY: 1.0 CLE Credits (Ethics)

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Drafting Effective Engagement Letters (EDU201001)

Agenda

1. The Basics of Client Engagement Letters
2. Fees and Expenses
3. Scope of Engagement
4. Best Practices
5. Q&A

Faculty Biography

Marcy Tench Stovall, Pullman & Comley LLC

Marcy Tench Stovall is Counsel at Pullman & Comley, LLC, and practices in the areas of professional liability, civil litigation, appellate practice, and employment law. In professional responsibility matters, Marcy regularly represents law firms and attorneys in malpractice litigation, as well as licensing, disciplinary and sanctions matters. Since 2000 she has served on the Connecticut Bar Association's Standing Committee on Professional Ethics, which issues opinions on attorney ethics, and currently serves as its chair.

Marcy has been a presenter at seminars on attorney ethics, professional responsibility and law firm risk management, and has authored or co-authored: *Client Consent to Future Conflicts Will Not Apply Where Disclosure is Inadequate* (ABA/BNA Lawyers' Manual on Professional Conduct); *Lawyer Mobility and Imputed Law Firm Disqualification: Implementing Timely and Effective Ethical Screens* (Connecticut Lawyer); *Attorney Advertising in Connecticut: Everything You Need to Know about the New Era of Oversight and Regulation* (Connecticut Lawyer); *Conflict Waivers: When in Doubt, Spell It Out* (Connecticut Lawyer); *Responding to a Disciplinary Complaint: The Do's and Don'ts* (Connecticut Law Tribune); and *Advancing Client Costs: Pitfalls and Changes in Rule 1.8(e)* (Connecticut Law Tribune).

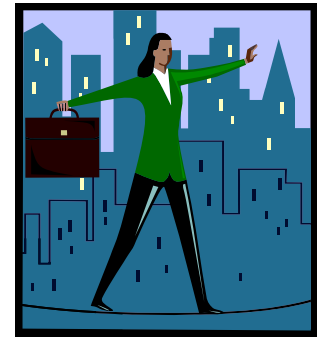
Connecticut Bar Association

Drafting Effective Engagement Letters: Suggested Best Practices



Marcy Tench Stovall

October 1, 2020



Client Engagement Letters: The Basics

- In Connecticut: **Terms of engagement** *must* be in writing
- Connecticut Rule 1.5(b):
 - Terms of engagement “shall be communicated to the client, *in writing*”

Client Engagement Letters: The Basics

- Model Rule 1.5(b):
 - Terms of engagement “shall be communicated to the client, *preferably in writing*”
- New York’s Rule 1.5(b):
 - Fee agreements “shall be in writing where required by statute or court rule”

Client Engagement Letters: The Basics

- Per Rule 1.5(b), at the beginning of the representation, you must memorialize in writing three essential items:

(1) the scope of the representation

(2) the basis or rate of the fee

(3) the expenses for which the client will be responsible.

Client Engagement Letters: The Basis of the Fees and Expenses

- What is the fee
- Who is responsible for paying the fees
- How frequently the client will be billed;
- Is there a guarantor?
- Provision for retainer deposit or evergreen deposit
- If not, then reserve the right to demand deposit/advance payment

Sample Language: Evergreen Provision

- *The Firm shall hold the retainer deposit as security until the Firm sends its final invoice, and applies from that deposit toward any outstanding balance owed at that time. In the interim, you will be required to timely pay each of the Firm's monthly invoices. If it becomes apparent that the retainer is insufficient to insure continued payment of invoices, the Firm reserves the right to request payment of an additional retainer deposit, and to terminate our representation of you if you do not deliver the requested deposit payment, with court permission when required.*

Client Engagement Letters: The Basis of the Fees and Expenses

- Staging the fee
- Firm cannot predict what total fee will be
- Notice of rate increase: client must receive notice before the higher charge is “incurred,” not billed
- Mortgage or other security interest: triggers firm’s duties under Rule 1.8(a) (“business transaction with a client”)

Client Engagement Letters: The “Basis” of the Fees and Expenses

- Personal injury contingent fees subject to statutory sliding scale cap (Conn. Gen Stat. §52. 251c)
- In Connecticut, no such thing as a “nonrefundable” fee (CBA Informal Opinion 00-12)

***Clarity in the fee provisions of an engagement letter is essential because so many malpractice claims arise only when the firm seeks to collect its fee

Sample Language: Client Acknowledgement

Client acknowledges that the retainer deposit does not represent the total amount the firm will charge for its services nor does it represent a “cap” on the total fee to be charged.

Sample Language: Guarantor's Undertaking

*The undersigned, as guarantor, agrees to absolutely, irrevocably and unconditionally guarantee the payment of fees and expenses that may become due for this matter. **THE GUARANTOR WAIVES ANY RIGHT TO A JURY TRIAL IN ANY PROCEEDINGS CONCERNING THIS GUARANTY.** The guarantor agrees that Connecticut law shall apply to this guaranty and that State shall be the exclusive venue concerning any dispute over this guaranty. Any such dispute shall be resolved by binding arbitration in accordance with the Fee Dispute Resolution Program Rules of the Connecticut Bar Association, found at www.ctbar.org.*

- Use the engagement letter to establish exactly what your law firm undertakes to do for the client:
 - A precise description of the mission/tasks specifically tailored for
 - each new client
 - each new matter for established clients
- Important to update in writing to confirm any time the initial mission is expanded or revised

Client Engagement Letters: Countersignatures

- RPC do not require client countersignature on engagement letters
 - New client reluctant to sign engagement letter = red flag
 - The dilemma of the unreturned letter
 - If firm does not require client countersignature, at least send engagement letter by some time-stamped method (fax, email)
 - ** Exceptions: contingent fee agreements, engagement letters with consents to conflicts/potential conflicts

Client Engagement Letters Are Not Just About the Fee: The “Scope” of the Engagement

- Important to identify the tasks *not* within the engagement
 - Example: Representation through trial, any appeals must be subject to new agreement
- Including tasks the client confirms it, and not the law firm, will perform
 - Examples:
 - *“This will confirm your accountant, and not the undersigned law firm, will provide tax advice concerning the transaction”*
 - *“This will confirm that as requested, the client, and not the firm, will record all lien releases”*
- Staging the representation or an agreement limited to “Phase One”

No such thing as one-size-fits-all
engagement letters

- Remind new clients of the limitations of what can and cannot be achieved:
 - “We are not miracle workers”
 - “Delays are part of the process”
 - “We are advocates, not gladiators”
 - “The aggressive approach equals the expensive approach”

Client Engagement Letter: Wording to Avoid

- As a general rule: avoid adjectives.
- Avoid superlatives and express promises of services, such as:
 - *“You may expect our firm to be both sensitive and professionally responsive to your situation.”*
 - *“I will be the firm attorney principally responsible for your representation.”*
 - *“My firm will provide the highest quality representation based on our well-deserved reputation for creative and effective business solutions.”*
 - *“I take extreme precautions to safeguard your electronically stored information.”*

Client Engagement Letter: Wording to Avoid

- The dangers
 - Unreasonably elevate the client's expectations of success
 - An enforceable guarantee of success or of staffing
 - The firm has voluntarily assumed a standard of professional care higher than "ordinary"
 - The Firm has assumed a contractual obligation other than performing services in "workmanlike" manner with a 6 year SOL

Client Engagement Letter: Wording to Avoid (Con't.)

- Achieve the client's trust and confidence through performance and personal interaction, *not* through puffery or express or implied guarantees within the engagement agreement

*Under promise.
Over perform.*

Client Engagement Letter: Wording to Counter Unrealistic Expectations

By entering into this agreement, you acknowledge that the firm has made no promises or guarantees concerning the outcome of your matter. The outcome of any legal matter, especially negotiations or litigation, can be subject to numerous tangible and intangible factors, rendering predictions impossible. During the course of our representation, we may offer you advice and recommendations. Any statements we make, however, must be considered an expression of opinion only, based upon information available, and should not be construed as a promise or guarantee.

- Well constructed engagement letter:
 - Tool in managing client expectations
 - Could mean difference between:
 - Summary judgment/triable issue of fact
 - Dismissal grievance complaint/finding of probable cause of misconduct
 - Establishes what actually happened at the beginning of the representation, rather than having to rely on memory or having to call client a liar

Client Engagement Letters Are Not Just About the Fee: The “Scope” of the Engagement

- A description of the scope:

“Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the “College”).

This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter.

This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you.”

Client Engagement Letters: Not Just About the Fee: The “Scope” of the Engagement

- What the Court held:
 - Summary judgment granted in favor of law firm because “an attorney may not be held liable for failing to act outside the scope of a retainer.”
 - “The letter of engagement conclusively demonstrated that there was no promise to negotiate. There was only a promise to investigate and consider whether there were any options possible available to urge the school to reconsider the plaintiff’s expulsion. *Anything else*, including the defendant’s failure to commence litigation against the school and the defendant’s alleged rendering of legal advice regarding the efficacy of the plaintiff’s commencing a defamation action against others, *was outside the scope* of the letter of engagement.”

Attallah v. Milbank, Tweed, Hadley & McCloy, LLP, 93 N.Y.S. 2d 353 (N.Y. App. Div. 2019) (*emphasis added*)

Client Engagement Letters Are Not Just about the Fee: Identify who Is the Client

- Define who *is* the client, and, if warranted, who *is not* the client
 - Examples:
 - *“The firm solely represents the company in the matter. The company agrees that the representation does not create an attorney client relationship, including a duty of loyalty, between the firm and the company’s affiliates.”*
 - *“The firm solely represents Employee. Employer agrees that even though Employer has agreed to pay each of the firm’s invoices for the services and expenses described herein, the firm’s representation does not create an attorney-client relationship, including a duty of loyalty, between the firm and Employer.”*
 - The firm represents the partnership, but not the partners individually (or vice versa).
 - In a matter involving family members, the firm represents specific family members, but not others.
 - In immigration matters, does firm represent employee or employer?

Client Engagement Letters are Not Just about the Fee: Identify who is the Client

- If there are multiple clients (joint representation)
 - address potential conflicts among jointly represented conflicts, and obtain consent *in writing signed by the clients at the commencement of the representation*
 - explain that confidential information will be shared among jointly represented clients
 - in the event of future adversity among the clients the possible results: complete withdrawal from matter, or continued representation of one or more, but not all

Joint Representation Warning: Possible Withdrawal by Firm

You each acknowledge and agree that, despite your current consensus on all material issues, it is possible that disagreements and other differences may arise in the future between or among the three of you. In that event, my firm will request that you resolve any such differences between or among yourselves without our involvement or assistance. If you cannot resolve your differences, and those differences result in a conflict of interest that would materially limit my firm's ability to provide competent and diligent representation to each of you in the above-referenced matter, then you each agree my firm may withdraw from the representation of one of you as necessary to resolve the conflict of interest.

OPTIONAL

In such event, you agree my firm may continue to represent the other, even if, as a result of such withdrawal, my firm may take positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.

Joint Representation: Business Formation

Dear Lucy and Ethel:

You each have told me that you each believe that you have reached agreement on all of the major issues between you concerning the creation of Quick Start, LLC and its operation. Based upon what you have told me, it would appear that you have, in fact, agreed upon many issues, including division of stock, ownership, compensation, and assigning management responsibilities.

Nonetheless, it is possible that one of you may change your mind with respect to one or more of these points as the documents begin to take their final shape. It also is possible that disagreements between the two of you may arise that neither you nor I presently know. For example, you may come to disagree about your rights to a buyout or about the relative allocation of other rights between you.

If differences do develop, I would not be in a position to advocate the interest of one of you against the other. In fact, the most I would do would be to lay out the possible alternatives, giving you some of the pluses and minuses pertaining to each one and urge that you review the matter with separate counsel in order to look after your separate interests. And if the points of divergence become too numerous or too significant, it is possible I would be required to stop representing one or both of you, as well as the LLC.

Choice of Law, Venue and Fee Dispute Resolution.

- If you include a choice of law provision, reference both the procedural and substantive law of the chosen jurisdiction.
- Under Connecticut law, statutes of limitation are procedural
- If you have an arbitration provision, identify the applicable limitations period

- Client duty to determine existence of insurance coverage for the firm's services
- Client duty to safeguard all pertinent records including ESI

- The “litigation hold”

Preservation Obligations. You should immediately take steps to preserve any information or documentation, whether in electronic or hard-copy form, that may relate in any way to Ms. Taylor's allegations. This includes preventing the deletion of electronic files and communications, such as e-mail messages, draft work products, correspondence, audio files, video files, calendars and memos – all of which must be preserved in their native formats - including such information contained on electronic devices. Please contact me if you have any questions.

The Declined Engagement Letter

- Confirm:
 - no investigation performed
 - no representation and no services to be performed
 - no or limited confidences received
 - return of any background documents
- Disclaim any duty to monitor changes in the law
- Warning: looming statute of limitations or other deadlines
 - Promptly consult with another attorney
- Internal follow up
 - Require intake lawyer to produce declined client letter in every case in which conflict check run but matter not opened

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Informal 01-09.

**Connecticut Ethics Opinion
2001.**

Informal 01-09.

June 26, 2001

INFORMAL OPINION 01-09

Need for a Rule 1.5(b) Written Statement When Clients Had Been Represented Differently in Prior Matters

The question presented relates to the requirement for providing a written statement to a client about representation in a new matter, when a lawyer previously provided legal services to the same persons and others in the family. On the facts presented: The lawyer had a friendship of many years with the son. The lawyer represented son and husband (his father) for three years in connection with a husband-son small business. After the business closed, the lawyer represented the son in a new business. Over several years, the lawyer provided the wife (husband's spouse) with gratis legal advice relating to her employer/employee relationships and rights as a real estate broker.

Six or more months after the work for the wife ceased, and three years after work for the husband-son business ceased, the wife and husband were sued by a neighbor in connection with an easement matter and their joint tenancy real estate. The son told the lawyer that the wife had unsuccessfully sought counsel from two other lawyers; and, the lawyer offered through the son to represent the wife and husband. Subsequently, the wife met with the lawyer and retained the lawyer on behalf of herself and the husband. The lawyer orally told the wife what fee he would charge, mentioning that his fees and costs could be substantial, but that his rate would be a lesser rate than previously charged to the son and husband. In view of the social and professional relationship with the family, the lawyer did not feel it necessary to communicate about fees in writing. The lawyer undertook the representation and obtained a verdict favorable in all respects to the wife and husband. Now, the wife (for herself and husband) has refused to pay any part of the bill because it is too much.

The inquirer has asked (1) how the term "regularly represented" in Rule 1.5(b) is construed and applied; (2) whether a written fee agreement was required; and, (3) if the answer to the latter is yes, whether the lawyer is precluded from recovering the costs and expenses component of his bill.

Rule 1.5(b) of the Connecticut Rules of Professional Conduct states:

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

The Comment to Rule 1.5(b) states in part:

When the lawyer has regularly represented a client, they ordinarily will have evolved an

understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. A written statement concerning the fee reduces the possibility of misunderstanding.

To "regularly represent" a client means to provide legal services on a periodic or frequent or contemporaneous basis. With respect to "When the lawyer has not regularly represented" in Rule 1.5(b), the analogous phrase in the comment, the phrases should be construed reasonably on a case-by-case basis, in the contexts of the rationale of the rule, the kind of client and kind of legal services. The rationale of the rule, from the comment, is that when there is a regular representation, the lawyer and client will have achieved an evolved understanding concerning the basis or rate of fee (and, we think, the scope of work and handling of costs and expenses).

The rule does not require that the new matter be of the same ilk as the matters of prior representation. But if the evolved past understanding provides insufficient basis for the fee for the new matter, then there must be appropriate written communication. It is advisable to address any uncertainty about the applicability of Rule 1.5(b) by making a written statement.

Rule 1.5(b) does not require a written fee agreement. See Informal Opinion 99-24. The rule only requires a written statement of (a) the basis or rate of fee; (b) whether the client will be responsible for court costs and expenses; and, (c) the scope of the work. In comparison, Rule 1.5(c) requires a written agreement for contingent fee matters.

Rule 1.5(b) puts a burden on the lawyer, to benefit the client. But having a written statement or agreement also benefits the lawyer. "It is in the best interests of both the lawyer and client for a written fee agreement to be in effect for all representations, whether or not required by local ethical or court rules or statute. By the very nature of preparing a written fee agreement and discussing it with the client, the lawyer will better be able to determine if the client truly understands the implications of the fee arrangement." *Statement of Principles in Billing for Legal Services*, ABA Section of Business Law (1995).

Courts in other jurisdictions have directly and inferentially addressed the need for a written or unwritten statement under Rule 1.5(b), or a written agreement under Rule 1.5(c). In *Terrell v. The Mississippi Bar*, 635 So. 2d 1377 (1994), the Mississippi Supreme Court reviewed a disciplinary matter involving Rule 1.5(b) and commented "[t]his was a personal injury case, thus not the type of matter that would lead to a career long lawyer-client relationship." And: "It stands to reason that whether the client is a new one or 'a regular,' if no basis or rate of the lawyer's fee has previously been established, the lawyer is responsible for communicating the basis of the fee to the client. The idea here is to protect the clients from surprise when the bill comes." (Sending a written statement is preferred, not mandatory, under Mississippi Rule 1.5(b).)

In *Estate of Inlow*, 735 N.E. 2d 240 (Indiana Court of Appeals 2000), a firm sought an award of attorney's fees in connection with the firm's services to the personal representative of a deceased's estate. The court said that the past dealings which the firm had with the individual%as an erstwhile partner and as an employee of a client%were to be distinguished from the firm's legal work for the individual in his or her capacity as personal representative of an estate. The court said that the law firm did not have an agreement with the personal representative of the estate, which was a violation of Indiana's Rule 1.5(c) (the equivalent to ABA Rule 1.5(b)). In our Informal

Opinion No. 00-22, we opined that a written statement was not required for a bank fiduciary of an estate, where the lawyer had regularly represented a bank as fiduciary in other estates.

In the present matter, we do not need to analyze whether that representation falls within the scope of "regularly represented" because, even assuming there had been regular representation of the individuals, a written statement still should have been provided to the husband and wife in their capacity as a joint tenant entity. As co-tenants, they comprise a different entity from themselves as individuals; and there had been no prior representation of the joint tenant entity. See *Estate of Inlow, supra*.

It is also worth noting that while the wife had been represented by the lawyer, inasmuch as the prior legal service given to the wife was gratis, the objective of the rule in connection with any new matter would not be achieved without written notification of the new fee structure. There can be no evolved understanding relating to a fee not charged (and, we presume, not communicated in writing as to what it might have been). The requirement for a statement "in writing" is intended to eliminate uncertainties and surprise, such as the wife evidenced in later objecting to the amount of the lawyer's bill. See *Terrell, supra*.

The third question presented, whether the lawyer can recover from the wife and husband for his costs and expenses, or his work, is a legal question%beyond ethics. The committee ordinarily does not opine on such questions. The Rules at Scope, sixth paragraph, state "Violation of a rule should not create any presumption that a legal duty has been breached." Notwithstanding, there are several Connecticut decisions relating to the right of an attorney to recover fees from a client in the absence of a written Rule 1.5(b) statement, where the client had not been regularly represented, e.g., it was the first representation.

Most Connecticut lower court decisions indicate that Rule 1.5(b) is mandatory and violation of the rule precludes recovery. *Kantrovitz & Brownstein, PC v. Ruotolo*, 116 WL 745863, (Conn. Super. 1996), and *Landino v. Black Tie Limousine*, 1999 WL 53279 (Conn. Super. 1999); *Freccia and Plotkin v. Castro*, Sup. Ct. Page 10805, Stamford Docket No. CV 96015137 (9/19/96) and *Whitman Breed Abbott v. Heithaus*, 28 CLR 43 (Conn. Super. 2000). Compare, *DeSarbo v. Cardow*, 1996 Conn. Super. Lexis 3227; New Haven J.D. (7/28/95) holding that "shall" in Rule 1.5(b) is not mandatory. The *Freccia* and *Whitman* cases were decided by D'Andrea, J. The first case held it to be against public policy to allow recovery of legal fees where an attorney had violated the ethical rules regarding Rule 1.5(b), citing *Silver v. Jacobs, infra*. In the second case, after reviewing the law, the court denied a prejudgment remedy application in part due to there having been no Rule 1.5(b) written statement. In *Silver v. Jacobs*, 43 Conn. App. 184 (1996), the court found that failure to have a written contingency fee agreement with the client violated Conn. Gen. Stat. § 52-25c and Rule 1.5(c); and, held that recovery was precluded, by one attorney from a successor attorney, for the value of services provided to the client.

Thus, in part the decisions of the lower courts relative to Rule 1.5(b) can be seen to relate to the decision of the appellate court in *Silver v. Jacobs* relative to Rule 1.5(c). In *Gagne v. Vaccaro*, 255 Conn. 390 (2001), the Supreme Court expressly overruled *Silver v. Jacobs*. It held that, where an attorney seeks to recover fees for work done for a contingent-fee client from a successor attorney, the absence of the written fee agreement, required under Rule 1.5(c) and related Conn. Gen. Stat.

§ 52-251c is not a bar to recovery based on *quantum meruit* or unjust enrichment. However, in both *Silver* and *Gagne*, the issue which was decided involved an original attorney's right vis-a-vis a successor attorney; and, not the right for recovery of an attorney relative to a client in context of a violation of either Rule 1.5(c) or Rule 1.5(b).

In answer to the third question: Prior to 1995, the rules required that a client pay costs and expenses of litigation. Under the present rules the lawyer can choose to absorb those charges. Therefore, no distinction is presently made between the lawyer's charge for services and the lawyer's charge for disbursements, including court costs and expenses.

In summary, the answers to the questions posed are: (1) the term "regularly represented" in Rule 1.5(b) should be construed reasonably on a case-by-case basis, in terms of frequency or periodicity, contemporaneity, the kinds of client and client matters, and the purpose of Rule 1.5(b) in eliminating client surprise; (2) in non-contingency cases, a written statement, not agreement, is required under Rule 1.5(b); and, (3) under the rules, there is no distinction in character amongst court costs, expenses, and the lawyer's work, with respect to how a client or lawyer may be responsible for such.

Standing Committee on Professional Ethics

February 19, 2020

Informal Opinion 20-01

**Limited Scope Representation and Fee Agreements
in Marital Dissolution Matters**

A lawyer with a family law practice asks whether it is ethically permissible to charge a client a flat (or “fixed”) fee for handling only “the key parts” of a marital dissolution, with the client having the option to “elect along the way” to engage the lawyer for other specific services, on either a flat-fee or an hourly-rate basis, as the need for these services arises.

The requestor’s inquiry gives rise to several related ethical concerns. First, the inquiry suggests that the lawyer intends to offer the same set of services to every marital dissolution client for a uniform, flat fee—offering, in effect, a standard, *prix fixe* “menu” of legal services to all dissolution clients, with additional menu choices available *a la carte*—rather than tailoring each flat-fee, limited scope engagement to the needs of the particular client. Second, the inquiry provides no indication that the requestor intends to provide the client with information sufficient to permit the client to make an informed decision¹ about engaging the lawyer on a limited scope, flat-fee basis. Specifically, while it appears that the agreement the lawyer envisions will identify the “key parts” of the representation for which the lawyer will assume responsibility, the inquiry provides no indication that the agreement will identify the tasks for which the client will be responsible, even though the client will be on his or her own with respect to those tasks unless and until the client and lawyer enter into a subsequent agreement assigning responsibility for some or all of them to the lawyer. Additionally, it is not clear from the inquiry that the requestor intends to provide prospective clients with explanations regarding the hybrid fee structure the request envisions adequate to meet the requirements announced in Rule 1.5 of the Connecticut Rules of Professional Conduct.

In the Committee’s view, a limited scope engagement that is not customized to the particular client’s matter, and does not include specific information with regard to the proposed division of labor as between lawyer and client, would run afoul of Rule 1.2(c)’s requirement that any limitation on the scope of representation be “reasonable under the circumstances” and supported by informed client consent.

We conclude, however, that, if the limitation of scope and all fees charged by the lawyer are reasonable under the circumstances, a lawyer may offer a marital dissolution client a limited set of services² at a flat fee, and may agree with the client that the lawyer will handle additional tasks on either a flat-fee or hourly-rate basis

¹ See Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

² It is noteworthy that Connecticut’s judges first introduced limited scope appearances in family courts, apparently having concluded that limited scope representation, while perhaps not ideal, would be preferable to no representation whatsoever for parties of limited means. See P.B. 3 § 3-8(b); State of Connecticut Judicial Branch, Notice of Limited Appearance Pilot Program, available at <https://www.jud.ct.gov/external/news/press366.htm> (last visited 9/10/19).

as the representation progresses, provided that the lawyer, before representation commences: 1) explains to the client the services the flat fee will cover; 2) outlines the other tasks that bringing the matter to conclusion is likely to require and for which—absent subsequent agreement—the client will be responsible; 3) explains the fee structure that will apply if the client elects to expand the scope of representation at a later date or the representation ends without the lawyer’s having performed all of the work covered by the flat fee; and 4) obtains the informed consent of the client as to the terms of the limited scope engagement, confirmed in writing.³

We note, too, that the lawyer must obtain the client’s informed consent, confirmed in writing, to any subsequent change in the scope of the representation.

Limited Scope Representation and Informed Consent

In a limited scope representation (sometimes referred to as “unbundled” representation), a client hires a lawyer to assist with discrete tasks, such as providing legal advice with regard to a specific situation; reviewing, preparing, or “ghostwriting” legal documents; or preparing the client to appear *pro se* in a legal proceeding. The lawyer also may take total responsibility for certain parts of a matter, leaving others solely to the client.

The request before us envisions a standardized, limited scope engagement assigning responsibility for what the requestor terms the “key parts” of a marital dissolution to the lawyer, *i.e.*, “filing the dissolution, obtaining financial records, completing mandatory disclosure requirements, [and] negotiating and drafting a settlement and getting it approved.”⁴ The request offers as examples of additional legal services not covered by the fixed fee, but available, as needed, on either a fixed fee or an hourly rate basis as the matter is underway, *inter alia*, handling *pendente lite* custody, child support, and alimony motions. Significantly, it makes no mention of the client’s responsibilities in the limited scope arrangement.

A lawyer may provide a limited set of services to clients in marital dissolution matters, but in each such case, the limitation on the scope of representation must be reasonable under the circumstances. *See* Rule 1.2(c). Assuming the limitation is reasonable and the client gives informed consent, Rule 1.2 “affords the lawyer and client substantial latitude to limit the scope of representation....” Rule 1.2 Commentary.

As an initial matter, we conclude that the “one-size-fits-all” limitation described by the request does not meet Rule 1.2(c)’s “reasonableness” standard. Some clients may not require all of the services in the bundle; a client with financial planning expertise, for example, may not need the lawyer’s assistance with preparing mandated financial disclosures, which the requestor deems a “key part” of the dissolution to be handled by the lawyer, and includes within the flat fee in the proposed service model. Other services the requestor categorizes as optional, or “matter[s] of choice,” may be key parts of a particular dissolution matter—e.g., motions

³ We note that not all engagements in which a lawyer charges a flat fee for a portion of the representation are limited in scope. If the client and lawyer agree at the outset that the lawyer will represent the client for all parts of the matter, but will charge the client a flat fee for certain services and bill for others at an hourly rate, this would simply be a full scope representation with a hybrid fee arrangement. In such circumstances, neither lawyer nor client envisions the lawyer’s allocating responsibility for any part of the representation to the client. Such an arrangement would be acceptable under the Rules so long as its terms are adequately disclosed to the client at the outset and the total amount charged is reasonable under the circumstances.

⁴ We assume that “get[ting the settlement] approved” refers to completing the procedural steps necessary to secure court approval of the settlement, rather than actually securing court approval, as a fee may not be so conditioned. *See infra* fn. 15.

addressing custody and child support where the divorcing parties have minor children, or a motion addressing spousal support where one party is employed and the other is not. In fact, it seems axiomatic that a limitation of the scope of representation that is reasonable in one client's circumstances may be unreasonable in another's, such that tailoring each limited scope engagement to the circumstances of the client engaging the lawyer is necessary.

Entering into a limited scope representation agreement with a marital dissolution client, fixed-fee or otherwise, requires that the lawyer, at the outset, "determine what kind of legal problems [the client's] situation may involve" (Rule 1.1, Commentary). Conducting an introductory interview to gather the facts necessary for making that determination is critical to assessing whether a particular limitation of the scope of representation will be reasonable under the circumstances.⁵ That assessment is likely to turn on, *inter alia*, the importance of the interests at stake, the complexity of the matter, the time required to address the issues presented by the matter, whether the tasks the lawyer will take on are sufficiently segregable from those to be handled by the client, and whether the client is capable of proceeding *pro se* or has access to other resources for assistance with some aspects of the matter.⁶

Both to identify the prospective client's legal problems and to make the crucial "reasonableness" assessment with respect to a contemplated limitation on the scope of the representation, family law attorneys must apply knowledge not only of the law governing marital dissolution, but also of "many other areas of state and federal law, such as estate planning, bankruptcy, and tax law."⁷

Further, as is the general rule, the lawyer must obtain the client's informed consent to the limited scope arrangement at the outset of the representation. Rule 1.2(c). "Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation." Conn. Informal Op. 09-01.⁸

Securing the client's informed consent in this context requires that the lawyer not only identify the client's legal problems, but also disclose to the client—at the outset of the representation—the reasonably foreseeable issues related to the client's problems, and divide responsibility for addressing them as between the client and the lawyer. The lawyer must advise the client not only of the tasks the lawyer will handle, both out of court and in court,⁹ but also of the need to plan for self-representation—or additional legal counsel—regarding

⁵ Because the request before us envisions a service model in which the lawyer will handle what the lawyer determines to be the key parts of a dissolution case for a flat fee, we will reserve for another day consideration of the situation in which a client who will handle, or already has handled, the lion's share of a dissolution matter *pro se* seeks to retain a lawyer to perform a single, discrete task, or a narrowly circumscribed set of tasks (e.g., opposing a motion for sole custody of minor children, drafting a QDRO, or reviewing a stipulation for settlement prior to the client's executing it and filing it in the court).

⁶ See Mark H. Tuohey III, *et al.*, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE, ABA (2003), at 63; see also Michelle N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. Tex. L. Rev. 159, 164-65 (Fall 2014).

⁷ Struffolino, *supra* at 164-65; see also Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 U. Miss.-Kan. City L. Rev. 965, 968 (2007).

⁸ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(f). See also Commentary to Rule 1.0(f).

⁹ Note that Rule 1.5(b) mandates that, if the limited scope representation will include court appearances, the lawyer's engagement agreement: identify the proceeding in which the lawyer will file the limited appearance; identify the court events for which the lawyer

reasonably foreseeable issues outside of the scope of the engagement, rather than waiting for such issues to arise.¹⁰

As Mark A. DuBois and James F. Sullivan have noted,

[f]or such a service model to work, the lawyer and the client must be able to reasonably identify the full range of legal work necessary to bring a matter to completion Inexperienced practitioners may not be able to adequately identify all of the work necessary for successful completion of a matter, and reaching an important milestone without a clear understanding of which party is responsible is a prescription for disaster. Some tasks involving complex work, such as producing a QDRO in a divorce case, may not be appropriately allocated to the client.¹¹

Discharging these preliminary obligations can be particularly challenging in family matters, where emotions run high, “[p]retrial motions are plentiful . . . [.] and it is not uncommon for seemingly uncontested issues to become the subject of an emergency motion or . . . require[e] an expedited hearing.”¹² Many an experienced family lawyer can attest to the speed with which a dissolution client’s post-filing discovery of marital infidelity, for example, or of an opposing party’s financial improprieties, or of child abuse perpetrated by an estranged spouse’s significant other, or of child pornography on an estranged spouse’s cell phone or computer, can transform what initially seemed a simple, uncontested divorce into a far more complex, fully contested matter.

Accordingly, while we conclude that the Rules require a lawyer contemplating entering into a limited scope agreement, at the outset, to identify the client’s legal problems and the reasonably foreseeable issues related to those problems, and then to allocate responsibility for the tasks likely to be required to bring the matter to conclusion as between lawyer and client, we remain mindful that the most universally foreseeable aspect of family law practice may be that a particular issue not “reasonably foreseeable” as representation begins will emerge and require attention as representation progresses.

A lawyer entering into a limited scope engagement must remain alert to such late-blooming issues, of course, and promptly bring them to the client’s attention if they arise. However, as is always the case, the drafters’ introductory reminder that “[t]he Rules of Professional Conduct are rules of reason”¹³ is the touchstone here: while the Rules require reasonable, lawyerly foresight, they cannot, and do not, require clairvoyance. That said, given the inherent unpredictability of family law cases, the prudent lawyer will be well-advised to caution the limited scope client, early on, that unanticipated developments are not uncommon in divorce cases, and

will appear on behalf of the client; and notify the client that after the limited appearance services have been completed, the lawyer will file a certificate of completion of limited appearance with the court, which will serve to terminate the lawyer’s obligations to the client in the matter, and as to which the client will have no right to object.

¹⁰ See Rule 1.4(a)(3) and (b), obligating the lawyer to “keep the client reasonably informed” and explain matters well enough “to permit the client to make informed decisions regarding the representation.”

¹¹ Mark A. Dubois & James F. Sullivan, CONN. LEGAL ETHICS & MALPRACTICE, §§ 1-3, at 23 (2016).

¹² Michelle N. Struffolino, *supra* at 180 (citing *Limited Assistance Representation (Unbundling) Training Materials*, Mass. Prob. & Fam. CT 3-5 (2009) (on file with the South Texas Law Review)).

¹³ Conn. R. Prof. Conduct, Scope.

sometimes warrant (or necessitate) expanding the scope of representation as representation progresses in order to protect important client interests.

Once the lawyer has secured the client's informed consent to the limited scope engagement, "[t]he lawyer must . . . memorialize [it] in the retainer agreement."¹⁴ Note that not only the initial limitation of the scope of representation (Rule 1.2(c)), but also any change to the scope of representation during its course (Rule 1.5(b)), requires the client's informed consent, confirmed in writing. If the new tasks require the lawyer to appear in court on the client's behalf, Rule 1.5(b) requires that the attorney file a new limited appearance in the matter, as well.

Note, too, that limiting the scope of the lawyer's representation does not limit the lawyer's ethical obligations to the client, to the court, or to the public. All lawyers, including lawyers providing limited scope representation, among other duties, must perform competently (Rule 1.1), act diligently (Rule 1.3), communicate timely (Rule 1.4), maintain confidentiality (Rule 1.6), and avoid conflicts of interest (Rules 1.7, 1.8, 1.9, and 1.10).

Fee Agreements

Under Rule 1.5 and its Commentary, a lawyer's primary ethical obligation in determining the basis or rate of a fee to be charged for legal services is that the fee must be reasonable under the circumstances. Expenses, likewise, must be reasonable. Rule 1.5(a) sets out eight nonexclusive factors for a lawyer to consider—if relevant to the particular matter—in assessing reasonableness, among them: the time, labor, and difficulty involved; the skill required and ability of the lawyer; the fee customarily charged; and whether the fee is fixed or contingent.¹⁵

Although lawyers may employ flat fee structures less commonly than hourly rates in marital dissolution matters, the Rules do not preclude them so long as the lawyer's fee is reasonable. "In assessing a fee's reasonableness, what is ultimately at issue is 'the reasonable value of the services rendered and value received by the client.'"¹⁶ With a sole exception unlikely to apply to limited scope, flat-fee engagements in the marital dissolution context,¹⁷ Rule 1.5(b) requires that the lawyer communicate "[t]he scope of the representation, the basis or rate of the fee and expenses for which the client will be responsible . . . to the client, in writing, before or within a reasonable time after commencing the representation"

The Committee's concern with the requestor's model in this regard lies with its recitation of the fee structure that would apply to the "*a la carte*" services available to limited scope clients upon request, as representation progresses. Per the request, clients who engage the lawyer in the proposed "key parts of the

¹⁴ Tuohey III, *et al.*, *supra* at 71, citing Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998).

¹⁵ Rule 1.5 prohibits contingent fee agreements in dissolution cases. Rule 1.5(d) provides that "[a] lawyer shall not enter into an arrangement for, charge, or collect: (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or civil union or upon the amount of alimony or support, or property settlement in lieu thereof[.]"

¹⁶ ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 79 (Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnerson, eds., ABA 8th ed. 2015), citing *Regions Bank v. Automax USA, L.L.C.*, 858 So.2d 593 (La. Ct. App. 2003).

¹⁷ Rule 1.5(b) exempts lawyers from the writing requirement "when the lawyer will charge a regularly represented client on the same basis or rate."

dissolution” service model would be able to “elect along the way to pursue other interim motions, which are really a matter of choice, also on a flat fee basis, *subject to limitations*.” (*Emphasis added*.) In a follow-up communication, the requestor has explained what “subject to limitations” means: while the envisioned model would make an array of supplemental pretrial services available to clients on a flat fee basis, if a case did not settle and a trial was necessary, the lawyer would provide trial-related services only if the client agreed to pay for those services at the lawyer’s customary, hourly rates.

The Committee discerns no ethical bar to a hybrid arrangement that would shift from fixed fee to hourly billing if a case goes to trial, provided that all fees are reasonable as required by Rule 1.5(a) and explained to the client and memorialized in the fee agreement at the outset as required by Rule 1.5(b). Although the lawyer’s hope, and perhaps even expectation, may be that every limited scope, marital dissolution case will settle in advance of trial, given the aforementioned unpredictability of family law matters (*see* discussion, *supra* at 6-7), that almost any limited scope case may take an unanticipated turn that causes negotiations to collapse such that a trial becomes necessary seems at least reasonably foreseeable. For that reason, to comply with Rule 1.5(b), the lawyer must explain to the client, at the outset, the fee structure that will apply in that event. So, too, must the lawyer explain to the client the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee (*e.g.*, if negotiations fail such that the lawyer does not draft a settlement agreement or shepherd it through the court, if the client discharges the lawyer (or vice versa) before the matter concludes, or if the case ends because the parties reconcile before the agreed-upon work is complete).¹⁸

To summarize, we conclude that to pass ethical muster, the limited scope, fixed fee engagement the inquirer describes requires a writing in which the lawyer, 1) sets out the amount of the fee and the expenses for which the client will be responsible, 2) explains which services will be included for the fixed fee and which parts of the matter will be the client’s responsibility, and 3) specifies how all charges will be handled for tasks not covered by the fixed fee if the client wishes to expand the scope of representation once work on the matter is underway and the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee. As bears repeating, the basis and rate of all fees, whether fixed or hourly, must be reasonable under the circumstances and explained to the client at the outset.

We offer, too, one final caveat with respect to fixed or flat fee arrangements: A lawyer operating pursuant to such an arrangement, whether in a full or limited scope matter, must take care to ensure that the capped nature of the arrangement does not adversely affect the lawyer’s ability to provide competent representation to the client as required by Rule 1.1. In fact, a lawyer may not ethically enter into

[a]n agreement . . . whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the

¹⁸ See Conn. Informal Op. 00-12 for a helpful discussion of the ethical issues that mitigate against lawyers’ use of nonrefundable fee agreements (which the opinion distinguishes from nonrefundable retainer agreements) as a general matter, and of the particular ethical issues presented by non-refundable flat fee agreements (which the opinion refers to as nonrefundable, lump-sum advances) in marital dissolution cases.

client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Rule 1.5, Commentary.

Even if the legal work necessary to complete the task or tasks specified in the flat-fee agreement takes substantially more time than the lawyer anticipates, then, the lawyer must complete the agreed-upon tasks, and do so competently (Rule 1.1), diligently (Rule 1.3), and at the agreed-upon price. For that reason, a lawyer contemplating entering into such an agreement should consider carefully all that accomplishing each of the agreed-upon tasks may require before setting the fixed fee for the lawyer's services. A fee established in the expectation of negotiating a divorce settlement in a matter of hours, for example, is unlikely to compensate the lawyer fairly if reaching agreement requires months of difficult negotiations. That the fee structure provide no incentive for the lawyer to provide the client with less-than-competent-and-diligent representation is an ethical imperative.

Conclusion

In sum, in the Committee's view, if the limitation of scope and all fees charged by the lawyer are reasonable under the circumstances, a lawyer may offer a marital dissolution client a limited set of services at a flat fee, and may agree with the client that the lawyer, at the client's request, will handle additional tasks on either a flat fee or an hourly basis as the representation progresses, but only if the lawyer, before representation commences: 1) explains to the client the services the fee will cover; 2) outlines the other, foreseeable tasks that bringing the matter to conclusion is likely to require, for which the client will be responsible absent subsequent agreement; 3) explains both the fee structure that will apply if the client elects to expand the scope of representation at a later date and the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee; and 4) obtains the informed consent of the client, confirmed in writing, as to the limited scope arrangement. We note, too, that the lawyer must obtain the client's informed consent, confirmed in writing, to any subsequent change in the scope of representation.

THE COMMITTEE ON PROFESSIONAL ETHICS

A handwritten signature in blue ink, appearing to read "Kim Rinehart", is written over a horizontal line.

BY Kim Rinehart, Chair

Informal 00-12.

**Connecticut Ethics Opinion
2000.**

Informal 00-12.

June 19, 2000

INFORMAL OPINION 00-12

"Nonrefundability" of Retainers

You have requested an Informal Opinion as to whether a client's retainer or advance may be "nonrefundable." You have also asked whether, if nonrefundable retainers or advances are permitted, such a "nonrefundable" retainer or advance can be taken in a matrimonial matter. Lawyers in Connecticut should approach the concept of "nonrefundability" of retainers or advances with considerable caution. The concept of "nonrefundability" is as slippery as a watermelon seed. Furthermore, the possible factual situations to which "nonrefundability" might be applied are so many and so varied that a general rule is extremely difficult to promulgate. In attempts to parse the "nonrefundability" sentence, courts, bar association ethics committees, grievance committees and other disciplinary boards and commentators have attempted to divide such fees into two categories: namely retainers and advances. The opinions and literature have dealt with particularly fact-specific analyses, and even with very similar facts, and have reached divergent results.

A retainer has been defined as a fee paid by a client and designated as "nonrefundable" by the attorney, even if the client terminates the attorney-client relationship and regardless of whether any professional services are actually rendered. Pennsylvania Bar Association Committee of Legal Ethics and Professional Responsibility, Opinion 95-100 (1995). Retainers in such situations are justified with the argument that in a retainer agreement, the client is paying solely for the assurance that the attorney will not represent a client with a conflicting interest, and the performance of future services by the attorney, although they may be included within the retainer performed, are not necessarily required. Further argument is that the attorney may have to forego representing clients in other matters due to conflicts or time restraints, and that the purpose of the retainer is to "remunerate him for loss of opportunity to accept other employment." The Supreme Court of Texas, Professional Ethics Committee, Opinion 431 (1986).

However, in each instance, the lawyer must provide some consideration, whether it be action in the form of professional services, or inaction in the form of refraining from representing other clients with conflicting interests or refraining from filling his time completely with some activity which prevents the lawyer from being "available" to the client. For an extreme case, see *Ryan v. Butera et al.* 193 Fed. 3d 210 (3rd Cir. 1999) (Lawyer permitted to retain one million dollar nonrefundable retainer after ten weeks' work where lawyer had been required to be available "as needed" in client's bankruptcy matter.) In that case, the lawyer provided consideration consisting of ten weeks' work and "availability as needed" in the client's bankruptcy matter. If the lawyer had gone to Timbuktu for the entire pendency of the bankruptcy matter, making himself unavailable

even by cell phone, or had made himself otherwise unavailable to that client, we find it difficult to believe that a court would have confirmed the "nonrefundability" of the fee. Disability due to illness or injury is more problematic, but it only emphasizes the morass into which a lawyer steps when he or she presumes to enter the world of "nonrefundability."

A common form of retainer is a payment to the lawyer to be available and to perform services "as needed" over a period of time, such as a year. However, the nonrefundability of the retainer presumes that the lawyer will be available, and, in many circumstances, will perform services "as needed." The word "retainer," then, describes a form of payment to a lawyer which is a lump sum in advance for performance of services described in advance "as and if needed" with the understanding that if the client makes only a limited demand upon the lawyer for services during the period, or even makes no demand at all, the lawyer retains the fee.

However, designating a fee as "nonrefundable" is not determinative. The Rules of Professional Conduct in Connecticut nowhere use the word. Rule 1.5, which governs fees, in its initial sentence proclaims that "a lawyer's fee shall be reasonable." Nowhere do we find an exception for fees which have been designated by the lawyer as "nonrefundable retainer." Also, included in the Commentary, is the following:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interests. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay....

In the absence of any such indication in rules, designation of a lump sum fee paid in advance as "nonrefundable" cannot except the fee from the requirement that a fee be reasonable. The factors to be used to determine reasonability are described in Rule 1.5, assisted by the Commentary, and include both consideration of the services performed for the client, as well as the deprivations which may be suffered by the attorney. Aspects of deprivation described in the rule include whether acceptance of the client's matter will prevent the attorney from procuring other employment, the time, labor, novelty and difficulty of the issues of a particular case, whether representing a particular client will necessitate the loss of other employment opportunities, or the case will utilize much of the firm's resources which also might result in fewer clients being retained.

Although a fee is described as "nonrefundable," and must necessarily be described in the engagement letter required under Rule 1.5(b), the term does not describe actions taken at the commencement of the representation. Where there is a retainer, it is normally paid by the client to the lawyer at the commencement of the representation. However, a "refund" and therefore, "refundable" and "nonrefundable," describe a payment from the lawyer to the client. This must necessarily postdate the initial payment of the fee by the client. Therefore, determination of the enforceability of a "nonrefundable" feature of a retainer fee, must include relevant circumstances which have occurred after the initial engagement and payment of the fee by the client, if there are

any.

Opinions and Commentary have distinguished an "advance" from a "retainer." An advance has been defined as "to pay money or render other value before it is due; to furnish something before an equivalent is received." *Black's Law Dictionary*, 712 (4th ed. 1968). The client gives his or her attorney an advance in anticipation of future services and those services, as they are rendered, will be offset against the advanced payment. The two concepts have been described as different in that, unlike retainers, an advance is the payment or deposit for the future services to be performed by the attorney, while a retainer, as stated hereinabove, is paying for the availability of the attorney or for performance of specific services by the attorney, without reference to and regardless of whether any services are actually rendered.

The use of "nonrefundable" retainers has been both endorsed and criticized. Numerous states have upheld the use of "nonrefundable" retainers if the attorney adheres to certain safeguards. Alaska Bar Association Ethics Committee, Opinion 87-1 (1987); State Bar of Michigan, Standing Committee on Professional and Judicial Ethics, Opinion R-7 (1990). Other sources have criticized "nonrefundable retainers." See *In Re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994). Commentators have gone both ways. See also, Brickman and Cunningham, *Non-Refundable Retainer: A Response to Critics of the Absolute Ban*, 64 U.Cinn. L. Rev. 11 (1995); Lubet, *The Rush to Remedies: Some Conceptual Questions About Non-Refundable Retainers*, 73 North Car. L. Rev. 271 (1994); McKinnon, *Analytical Approaches to the Non-Refundable Retainer*, 9 Georgetown Journal of Legal Ethics 583 (1995); Brickman and Cunningham, *Non-Refundable Retainers Revisited*, 72 North Car. L. Rev. 1 (1993). The Colorado Supreme Court has also weighed in on the issue. ABA/BNA *Lawyers' Manual on Professional Conduct, Current Reports*, Vol. 16, No. 10, Page 268.

Our deliberations have determined that it is not uncommon for lawyers who practice in certain areas of the law (such as criminal law) to be paid a fixed lump sum fee prior to the commencement of the representation. The fee is for a particular service, such as appearance at a hearing or a trial, or defense of the accused until the matter is disposed of, or until completion of the trial level, *etc.* and the fee does not depend upon the amount of time or effort which the attorney expends during the representation. For example, an attorney can accept a lump sum fee for representation in a criminal matter, and then convince the prosecutor to dismiss the action in one conference or court appearance. Successful results make the fee reasonable, regardless of the amount of time spent to achieve the results. Even if the result is not particularly successful, if the services agreed upon have been performed, and the fee is reasonable, the lawyer will not be required to refund any of the fee to the client. We see no basis upon which to criticize that practice. In fact, the practice serves the laudatory purpose of providing legal services to those who need them. The reasonableness of the fee may be determined upon time, or upon the other factors described in Rule 1.5. However, if the client pays a lump sum fee before the engagement, and, through no fault of the client, the lawyer does not perform as agreed, that is, does not see the prosecutor, does not go to court, does not participate in the trial, and in one of those ways does not fulfill the obligations of the engagement, then designation of the fee as "nonrefundable" cannot protect the attorney from a requirement to refund all or a portion of the unearned fee.

Although the term "advance" normally contemplates the performances of services, whereas the term "retainer" normally implies either, or both, services or depravity inaction, the distinction between the two becomes muddled in the application to individual facts, situations and complicating factors. In the case of an advance, for example, the "equivalent" to be received by the client could be the right to call upon the attorney for services, even though no services are actually called for.

Similarly, the application of the term "nonrefundable" can lead to confusion. As we have stated, a fee, whether designated a nonrefundable retainer or not, must be fair and reasonable. South Carolina Bar Ethics Advisory Committee, Opinion 93-12 (1993). The amount of nonrefundable retainer should not be so great as to restrict a client's right to discharge his or her attorney at any time with or without cause. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 95-100 (1995). If the fee is excessive, then the client may be persuaded not to terminate his or her attorney-client relationship, knowing that he will not recover this amount paid. "The amount of the retainer should not be so great as to influence a client to pursue litigation contrary to public policy or to the best interests of the client." Alaska Bar Association Ethics Committee, Opinion 87-1 (1987).

Our deliberations indicated that disciplinary boards are not unfamiliar with grievances against attorneys who have accepted a fee for a service but have failed to perform the service. Application of the term "nonrefundable" to the fee is no protection for such attorneys. See, for example, *Connecticut Lawyer*, Vol. 10, No. 5, p. 16 "Professional Discipline Digest."

Even if used, the "nonrefundability" feature must meet requirements. It should be fully explained to the client, orally and in writing, to ensure that the client completely understands the amount to be paid and the nature of the services to be performed or the deprivation to be suffered by the attorney. The client's state of mind and ability to understand the agreement are also essential. Alaska Bar Association Ethics Committee, Opinion 87-1.

Whether or not the term "nonrefundable" is used by an attorney to describe a retainer fee, that fee must be reasonable according to Rule 1.5, there must be an engagement agreement or letter in writing which makes clear to the client the amount of the fee and the services or other consideration to be provided, the time or other limitation, and the client must be sufficiently intelligent to understand the amount of the fee and the nature of the services or inaction, and the retainer must not be so large as to likely chill the client's right to terminate the attorney-client relationship if the client becomes dissatisfied with the attorney's services. Because of the considerations we have described, many lawyers will decide that it is unwise to use the term "nonrefundable" with regard to a flat fee charged at the commencement of an engagement, and, rather, rely for a claim of nonrefundability upon the description of the fee and the consideration for the fee, provided both orally and in the engagement agreement or letter, as required by Rule 1.5. Your second question asks whether a "nonrefundable retainer or advance" can be taken in a matrimonial matter. All of the considerations that we have described hereinabove are applicable to matrimonial matters as well as any other. However, there are additional considerations which govern these in matrimonial matters. In our consideration we do not include in our definition of a "matrimonial matter" a proceeding that has as its sole purposes post-judgment collection of

alimony or child support arrears, as such actions have appropriately been classified as "debt collection" and may be approached differently. See *e.g.*, *Davis v. Keenan*, Statewide Grievance Committee, #91-0409, at 7 Connecticut Family Lawyer, No. 4, p.27 (Fall 1992) (not unethical to charge contingency fee in post-decree alimony collection action).

Several features apply especially to matrimonial matters or apply with greater force in matrimonial matters. First, allowing a fee in a matrimonial matter as a "nonrefundable" fee seems to undervalue the character of the particular nature of the relationship between lawyers and clients in dissolution and other matrimonial matters. See, *Monroe v. Monroe*, 177 Conn. 173 (1979).

Second, such a fee arrangement can leave the client "captive" to counsel, unduly undermining the client's right to choose counsel. This problem arises in marital matters: (a) because the client may hesitate to leave counsel because he or she doesn't want to lose the "unearned" portion of the retainer; (b) the funds "left behind" may be all that the client has available to retain new counsel; and (c) in the intense emotional atmosphere of a matrimonial matter, the client may have made an emotional investment in the attorney-client relationship which may prevent or at least dilute their ability to form another relationship with a new attorney. We have indicated our disapproval, in other contexts, of fee terms that inhibit a client's ability to change counsel or control the ultimate outcome of the case. See Informal Opinion 95-24. Also, the financial aspects of a domestic relations matter must be taken into consideration. Since all of the financial resources of the parties are subject to the court's jurisdiction, the retention of unearned fees may be the retention of an interest in property that is the subject matter of the litigation, which is barred by Rule 1.18(j). See *a/so*, Connecticut Practice Book § 25-5(a)(1). In Informal Opinion 87-3, it concluded that Rule 1.18(j) did not inhibit lawyers from taking mortgages on "marital" property to secure fees, but the Statewide Grievance Committee has not agreed with us. Furthermore, an important distinction can be made between authoritative opinions, which involved fees that had been, or were being, earned, and Opinions, which involved funds that were being withheld from the client by the lawyer, even if not earned.

These additional features make it even less likely that a careful attorney will apply the term "nonrefundable" to a fee paid in a matrimonial matter.

In summary, whether or not a "nonrefundable" fee is ethical, depends upon what "nonrefundable" is. Neither the term "nonrefundable," "refundable," "retainer" nor "advance" is used in Rule 1.5, which is the portion of the Rules of Professional Conduct governing fees.

Therefore, the use of such terms neither adds to nor subtracts from the ethical nature of the fee. Whether or not a fee or a fee agreement is ethical, depends upon the factors proscribed in Rule 1.5. A careful lawyer would recognize that any and all features of a fee or a fee agreement should be spelled out in the engagement letter or the agreement.