Protecting Your Assets: Drafting Ethical and Profitable Representation Agreements

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Several years ago, AILA published an interesting advisory on the most common ethics complaints against immigration lawyers.[1] The list predictably emphasized three main problems: client communication, handling client money, and attorney competence. These problems included failing to explain the process or the legal fees, to return client's files, to maintain trust accounts, and to deliver promised results.

Representation agreements may be the most important tool for attorneys to protect themselves from these common ethical challenges. They reduce the possibility of misunderstanding and promote good client relationships, but only if they are carefully prepared. Courts and disciplinary authorities consider representation agreements as the logical starting point for resolving fee and other ethics disputes, carefully scrutinizing these agreements for signs of overreaching by the attorney. The implicit message for attorneys preparing representation agreements is that attorney-client relationships are built on trust. The client depends on the attorney to resolve matters of "great moment."[2] Because of the fiduciary relationships involved, fee agreements are governed by more than mere contract law. This advisory provides practical guidance for attorneys to prepare ethical representation agreements for successful client engagements.

Key Components

The first consideration is whether to have a written agreement at all. Although the Model Rules of Professional Conduct may not necessarily require written fee agreements, attorneys need to review their applicable state rules. Many states require written agreements for all cases, or if not for all cases, at least for certain cases.[3] Written agreements are always a good practice. They advance the attorney's general duty of communication by promoting mutual understanding of the scope of the representation and the agreed-on fees for the work.[4]

The written agreement should address the following key components:

1. How the attorney will be compensated;
2. Scope of representation, including services not covered;
3. Client responsibility for costs, including any applicable filing fees; and
4. File retention after the case is done.

Payment Arrangements

The governing standard of reasonableness applies to all fees regardless of the payment arrangement. Rule 1.5(a) specifically prohibits lawyers from charging or collecting an unreasonable fee or an unreasonable amount for expenses. The rule outlines criteria to be considered in deciding whether a fee is reasonable.[5] No single factor controls the reasonableness of a fee, and a fee that appears reasonable at the outset may become unreasonable based on later events. The representation agreement should clearly explain the basis for the legal charge, ensuring that the client understands the billing approach.

Hourly Billing

The traditional payment arrangement is hourly billing. The representation agreement should clearly disclose that the legal services will be billed hourly, listing hourly rates for lawyers or legal assistants involved in the case.

Discussions of hourly billing often focus on instances of abuse, including billing more than one client for the same hours spent. For instance, the attorney may be scheduled for a court appearance (or master calendar hearing) on behalf of more than one client during the same period of time. The attorney would need to spend the same amount of time in court for each client. Can the attorney then bill both clients for the two hours it takes to complete the proceedings? In another example, an attorney may have just completed a long research project for one client, and the research results happen to be directly relevant to a second client who coincidently faces the exact same issue. Can the attorney bill the second client for the time it spent on the first case? In both examples, the question should be addressed from the perspective of what the lawyer actually earned. The lawyer who spent two hours in court did not earn four billable hours. Likewise, the lawyer would earn an unreasonable fee by charging more than one client for the same work answering an identical question. With disclosure and informed consent, the lawyer may charge more for a good result or for being especially efficient on a project, but the lawyer billing by the hour should never charge for hours not actually spent on a case.

Flat Fees

Flat fees represent a reasonable alternative to hourly billing that is especially common in immigration matters. Clients may prefer to know exactly what a particular legal service will cost, and attorneys may prefer to leverage their experience. The flat fee reflects an element of shared risk between the attorney and client. The attorney agrees to do more work than planned without additional compensation, and the client agrees to pay the agreed-on amount, even if it may exceed the charge resulting from the attorney's usual hourly rate. A flat fee is intended as a maximum fee to be paid for services provided regardless of the outcome. A flat fee is not a success fee; the lawyer earns the fee even if the client's case is denied. Representation agreements should carefully define the scope of the services for the benefit of both the attorney and client. A simple marriage-based adjustment may become a very different case if the client fails to disclose what he perceives to be a relatively minor drug-paraphernalia citation that actually makes him inadmissible without a waiver. A representation agreement that specifies the need for a waiver to be outside the scope of the representation would avoid later misunderstanding regarding the need to change the agreement during the representation.

As advanced fees charged for future services, flat fees raise two related ethical questions. First, do attorneys place flat fees in their trust accounts? Second, if the fees are placed in operating accounts, are they refundable?

Attorneys charging flat fees should consider the following best practices:

1. Never charge a flat fee without a written fee agreement;
2. Take time to clarify the scope of representation, including specific services covered;
3. Never describe the fee as "nonrefundable";
4. Determine if your jurisdiction permits treating flat fees as attorney property;
5. If you place flat fees in your operating account, always treat them as potentially refundable;

6. Consider holding flat fees in a trust account until earned, but with a written agreement to treat portions of fees as being earned during the course of representation at certain benchmarks or stages of representation.

Many jurisdictions allow the attorney to treat a flat fee as the attorney's property and to place the client's payment directly into the business account. However, before placing the fee into a business account, the attorney must have a written agreement that notifies the client of the scope of services to be provided, specifies the total amount of the fee and terms of payment, and also specifies that the fee will not be placed in a trust account, that the client has a right to terminate the attorney–client relationship, and that the client will be entitled to a refund if the agreed-on services are not provided.[6] This required provision addresses a common flat-fee scenario that occurs when the attorney treats the flat fee as earned upon receipt, does little or no work, and then refuses to refund any portion of the fee if the client terminates the representation or the attorney does not complete the agreed-on services. Nonrefundable retainers impair clients' right to choose and discharge their lawyers, and flat fees are necessarily unreasonable if the lawyer performs no services.

Trust Accounts

Trust account issues dominate discussions regarding flat-fee billing. Lawyers often use flat-fee billing as a way to avoid placing funds in trust. The safest course of action may be for lawyers to hold the fees in their trust accounts until earned during the course of the representation. Lawyers following this conservative approach should specify in the representation agreement when the fee will be considered earned, allowing lawyers to take fees out of trust and put them into their business account.

The lawyer acts as a fiduciary for client funds and property held in trust. Trust funds must be kept in an account that is separate from the lawyer's personal or business accounts to avoid problems of commingling. Certain ethical obligations apply in dealing with attorney trust accounts, including to:

1. Keep client funds in a separate account;
2. Notify client when funds are received;
3. Provide a timely accounting to the client; and
4. Refund unearned legal fees to the client.[7]

Client vs. Responsible Billing Party/Dual Representation

The representation agreement should address potential conflicts of interest that would limit the lawyer's ability to provide ethical representation.

One example would be when a non-client pays for the representation. "A lawyer may be paid from a source other than the client, including the co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client." The lawyer may be paid by a non-client, but only with the client's consent if the arrangement does not interfere with the attorney–client relationship and client confidentiality is protected.[8] The person who pays the fee is not entitled to any special treatment or to information that otherwise would be protected by the duty of confidentiality that is established through the formation of an attorney–client relationship. The representation agreement should be drafted to ensure the client's informed consent to payment by a non-client.

Dual representation presents a similar question on special treatment owed to the client who pays. The client who pays is not entitled to a stronger degree of loyalty.[9] Immigration law often involves dual representation of the petitioner and beneficiary in employment and family-based matters. If both parties are represented, then both parties are clients, and the same level of representation is owed to each one.[10] A written agreement with only one party would not be conclusive as to the existence of an attorney–client relationship with the other party, since representation may be implied from action on behalf of the client. Common conflicts can be anticipated and avoided through discussion with all parties at the outset of the case, and a written representation agreement that discusses the limits of the representation should place both parties on notice to minimize the likelihood of a conflict arising. The written agreement should be signed by both parties if possible, with a clear disclosure of the types of conflicts that may arise and separate provisions on which party is responsible for the fee.

File Retention and Destruction

As a final practice pointer, the representation agreement gives the attorney the best opportunity to address what happens to a client's file after the case is done. Lawyers are not obligated to preserve client files permanently. At the same time, the ethics rules contain no statute of limitations or similar deadline for when client files can be destroyed without liability to the attorney, and there is a surprising amount of uncertainty on file retention and destruction procedures.[11] The most conservative approach is to keep client files indefinitely, but the costs would be prohibitive to many attorneys and permanent file retention is unnecessary from an ethics standpoint. Still, clients need to be apprised of the appropriate file retention period. This type of notice can best be provided through the representation agreement or at the conclusion of the representation. The representation agreement should be used to establish that the firm will keep only an electronic copy of the client file and that the file will be destroyed after a set period of time (say, seven years) without further notice to the client. If a client is properly apprised, the demand for a file after the file retention period would be unreasonable. The firm's file retention period should be established based on the client's anticipated need for the file, and the attorney's actual experience in accessing closed files based on the specific type of case.

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[1] R. Trautz, "Top Five Most Common Ethics Complaints in Immigration Practice," *Immigration and Nationality Law Handbook* 26 (AILA 2007–08 Ed).
[2] "Billing for Professional Fees, Disbursements, and Other Expenses," American Bar Association (ABA) Formal Opinion 93-379 (Dec. 6, 1993).
[3] ABA Model Rule 1.5(b) provides: "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing."
[4] ABA Model Rule 1.4.
[5] ABA Model Rule 1.5(a) provides that reasonableness may be based on the time involved, skill needed, inability to accept other work, the customary fee for similar legal services, results obtained, time limitations imposed by the client, the relationship with the client, the lawyer's reputation, and whether the fee is fixed or contingent, but these factors are not exclusive. See Comment 1.
[6] See Minnesota Rules of Professional Conduct, Rule 1.5(b)(1).
[7] ABA Model Rule 1.15: Safekeeping of Property.
[8] ABA Model Rule 1.7, comment 13; see ABA Model Rule 1.8(f).
[9] *Id*.
[10] A. Fragomen & N. Yakoob, "No Easy Way Out: The Ethical Dilemmas of Dual Representation," 21 *Georgetown Immigration Law Journal* 621 (Summer 2007).
[11] "Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients," ABA Informal Opinion 1384 (1977).