Seminar Materials

In Trust, or Not? That is the Question

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New Rules on Flat Fees

Vermont Bar Association
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History

• Remember – there is a difference between a “retainer” and a “fee paid in advance.”

• For the most part, what we have come to call a “retainer” is really a fee paid in advance.

• What is the hallmark that makes it such?

Retainer vs. Fee Paid Advance

• Do you bill against it?

• If so, it’s a fee paid in advance.
VBA Advisory Opinion 2005-04

• An attorney may charge a flat fee or a minimum fee, so long as the basis for the fee is understood by the client and the fee is reasonable when measured by Rule 1.5(a).

• Any advance payment remains the property of the client until earned and must be deposited in the attorney's trust account.

• If, however, the client knowingly agrees the fee is “earned upon receipt,” it becomes the property of the lawyer and cannot go into the trust account.

2009 Rules Amendment

• The Court, per the Civil Rules Committee, amends Rule 1.15.

• Creates new Rule 1.15(c).

• Based on ABA Model Rule.

• In response to ABA Ethics 20/20 Commission report that “single largest class of claims made to client protection funds is for the taking of unearned fees.”

Claims to Client Security Fund

• ABA Commission’s note is not consistent with what had happened in Vermont.

• Prior to 2009, single largest class of claims made to the VBA Client Security Fund had nothing to do with flat fees or fees paid in advance.

• What was it?
2009 Amendment – New Rule 1.15(c)

“A lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer’s possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.”

In other words, fees paid in advance go into trust until earned.
The Kicker: Reporter’s Note

“Note that new Rule 1.15(c) requires deposit in a lawyer’s trust account of any fees . . . paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered . . .”


- Advisory Opinion 2005-04
  - May agree to label a fee paid in advance “earned upon receipt”
  - If so, cannot go into trust
- Reporter’s Note
  - “no matter how designated”
  - “for services subsequently rendered”
  - Into trust

No Matter How Designated

- How did lawyers respond to “no matter how designated” language?
They put advance fees into trust.

• “Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.”

• What problem arose?

Inquiry to Bar Counsel

• I charge flat fees for DUI. I know I’m supposed to leave a flat fee in trust until earned. When is my fee earned?

• What did the rules/comments say?

2009 rule – when is a flat fee earned?

• There was no guidance in the rules or comments.
Inquiries of Bar Counsel

• In 2012, 2013, 2014, single most common request “mike, we need guidance or a rule change” was on the topic of when a flat fee may be considered earned.

PRB Gets Involved

• January 2015, PRB proposes that the Court amend Rules 1.5 and 1.15 so as to allow lawyers treat flat fees as their own.

• Came after months of studying issues, including different approaches taken in other states.

• New approach is based on Maine’s rule

Proposal

• Sent to Civil Rules Committee in January 2015
• Approved by Court in March 2016
• Went into effect May 9, 2015
New Rules

• 1.0 (o)
• 1.0 (p)
• 1.5 (f)
• 1.15(c)

Old Rule

• Don’t forget about 1.5(a)

• No fee can be unreasonable, even a fee paid in advance that otherwise complies with Rule 1.5(f) and Rule 1.15(c)

Pros & Cons

• I recommend this article by Sam Glover at Lawyerist

• https://lawyerist.com/47453/procon-flat-fees/
Pros

• Billing by the hour discourages efficiency
• Flat fees do not. They might force you to become more efficient.
• Cost certainty
• It can be a pro not to have to track time or handle trust accounting associated (but don’t forget – still subject to reasonableness)

Cons

• Case “blows up”
• Tough to determine price point
• Could discourage early resolution out of fear client will be upset

Are they for you?

• Maybe. Remember – you can use flat fees, without making every case a flat fee case.
• Flat fee – simple contract or will that can be reused. But not for litigation.
Rule 1.0. TERMINOLOGY

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other entity or association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “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.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of any other entity or association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court and all ancillary court proceedings such as depositions and hearings before a referee or master, an arbitrator in a binding arbitration proceeding or a legislative body,
administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. —Amended June 17, 2009, eff. Sept. 1, 2009.

(o) “Advance,” “advance payment of fees,” or “retainer” means a payment by a client in anticipation of the future rendition of services that is not earned until such services are rendered and that is to be credited toward the fees earned when such future services are rendered. Amended March 7, 2016; eff. May 9, 2016.

(p) “Nonrefundable fee” means a fee paid to an attorney and earned by the attorney before professional services are rendered. Such a nonrefundable fee may be in exchange for retaining the attorney’s availability alone or may be in exchange also for the right to receive specified services in the future for no additional fee, or for a stated fee. Amended March 7, 2016; eff. May 9, 2016.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.
[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations, including public defenders. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

[5] When used in these rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Of course, the information and explanation adequate to establish informed consent by a non-client may be confidential information of a client that is protected by Rule 1.6. In such a case, the consent of the non-
client cannot be obtained unless the affected client gives informed consent to disclosure of the necessary information and explanation, or the nature of that information and explanation can be conveyed to the non-client in a way that protects the client’s confidential information. ALI, Restatement Third: The Law Governing Lawyers, § 122, comment c(i). Cf. Rule 1.9, Comment [3].

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of “writing” and “confirmed in writing,” see paragraphs (n) and (b). Other Rules require that a client’s consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening. Historical Citation Amended June 17, 2009, eff. Sept 1, 2009; November 22, 2011, eff. January 23, 2012; March 7, 2016; eff. May 9, 2016. Reporter’s Notes—2016 Amendment Rules 1.0(o) and (p) are added to define terms used in the simultaneous amendments adding Rules 1.5(f) and (g). Reporter’s Notes—2012 Amendment The amendment to Rule 1.0, Comment [8], implements the simultaneous amendment of Rule 1.10 to the list of rules to which the definition of screening applies.

Reporter’s Notes — 2009 Amendment

V.R.P.C. 1.0 is adopted to conform to the Model Rules amendments in moving former preliminary section III, “Terminology,” to a new Rule 1.0. See Reporter’s Notes to simultaneous amendments of
Preamble and Scope. “The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions.” ABA Reporter’s Explanation of Model Rule 1.0.

The ABA Reporter’s Explanation further provides as follows:

1. Delete “consult” or “consultation” The Commission recommends deletion of the term “consent after consultation” in favor of “informed consent,” which is defined in paragraph (e). This change is being made throughout the Rules. No change in substance is intended.

2. Paragraph (b): “Confirmed in writing” The Commission has proposed requiring a lawyer to obtain the informed consent of a client or other person, “confirmed in writing,” in some circumstances. See, e.g., Rule 1.7. The term “writing” is defined in paragraph (n).

3. Paragraph (c): “Firm” or “law firm” These changes conform the definition to the changes made in the Comment to Rule 1.10. The Commission is also recommending that the material presently in the Rule 1.10 Comment be moved to the Comment under this Rule. See Comments [2] -[4]. The phrase “including the government” has been added to Comment [3] to clarify that legal departments of government entities are included within the definition of “firm.” The reference to “other association authorized to practice law” was added to encompass lawyers practicing in limited liability entities. No change in substance is intended.

4. Paragraph (d): Clarify that “fraud” refers to conduct characterized as fraudulent under other applicable law The [former] definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered “fraudulent” merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.

5. Paragraph (e): “Informed consent” The Commission recommends that throughout the Rules the phrase “consent after consultation” be replaced with “gives informed consent.” The Commission believes that “consultation” is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term “informed consent,” which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

6. Paragraph (2): “Partner”: Added reference to “member of an association authorized to practice law” As with the change to paragraph (c), this reference was added to encompass lawyers practicing in limited liability entities.

7. Paragraph (k): “Screened” The current Model Rules do not impute conflicts of interest in certain situations when the personally disqualified lawyer is screened from any participation in the matter. See
Rules 1.11(b) (former government lawyers) and 1.12(c)(1) (former judges). The Commission is proposing similar treatment of other situations involving a conflict of interest on the part of one lawyer in a firm. See Rules 1.12(c)(1) (former third-party neutrals) and 1.18(d)(1) (discussions with prospective clients). The Commission is recommending that the requirements of an effective screen be set forth in this paragraph and in the accompanying Comments.

8. Paragraph (m): “Tribunal” This term was not previously defined. The Commission recommends including a definition and including not only courts but also binding arbitration and legislative bodies, administrative agencies or other bodies acting in an adjudicative capacity. [For clarity, language has been added to specify that “court” includes ancillary proceedings such as depositions or master’s or referee’s hearings.]

9. Paragraph (n): “Writing” or “written” Given the Commission’s recommendation that writings be required in more circumstances, it also recommends that the term be defined and that the definition include tangible or electronic records. With respect to electronic records, the paragraph provides a definition of “signed” that includes methods intended as the equivalent of a traditional signature. The electronic signature provisions are modeled on the Uniform Electronic Transactions Act.

COMMENT:

[1] This new Comment was added to clarify that if it is not feasible to obtain or transmit a writing at the time a person gives informed consent, a lawyer may undertake or continue representation based on the oral informed consent, so long as the writing is obtained or transmitted within a reasonable time thereafter.

[2] This paragraph was taken from the Comment to Rule 1.10. It is unchanged, except for the addition of a reference to paragraph (c).

[3] This paragraph was taken from the Comment to Rule 1.10. The only change is stylistic, and no substantive change is intended.

[4] This paragraph was taken from the Comment to Rule 1.10. The Commission concluded that the [former] Comment is confusing. The revision is intended to clarify that organizational structure will determine whether the entire organization or different components will constitute a firm or firms for purposes of these Rules.

[5] Under applicable substantive law, “fraud” may not be actionable unless someone relied on a misrepresentation or failure to inform and consequently suffered damages. This paragraph makes it clear that reliance is not required for purposes of the disciplinary rules, which focus entirely on the nature of the conduct in question.

[6] This new Comment provides cross-references to Rules requiring the lawyer to obtain the informed consent of the client or another person within the meaning of this Rule. It also explains the requirements of lawyer communication under the Rule. [Language has been added to ABA Comment [6]
clarifying the application of the definition of “informed consent” in Rule 1.0(e) when disclosure of confidential client information may be necessary to obtain the consent.]

[7] This new Comment explains what is required in order to constitute a manifestation of consent by the client.

[8] -[10] These new Comments provide cross-references to Rules that provide for screening and explain in more detail what measures may be adequate to assure an effective screen.
Rule 1.5. FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(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.

(b) 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, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) 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 divorce or upon the amount of spousal maintenance or support, or property
settlement in lieu thereof. Contingent fees are not forbidden in domestic relations matters which involve the collection of:

(i) spousal maintenance or property division due after a final judgment is entered or

(ii) child support and maintenance supplement arrearages due after final judgment, provided that the court approves the reasonableness of the fee agreement.

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

(f) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation

   (i) that the funds will not be refundable, and

   (ii) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee.

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client’s right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties’ agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this rule, a fee agreement may describe a fee as “nonrefundable,” “earned on receipt,” a “guaranteed minimum,” “payable in guaranteed installments,” or other similar description indicating that the funds will be deemed earned regardless of whether the client terminates the representation. Added March 7, 2016; eff. May 9, 2016.
(g) A nonrefundable fee that complies with the requirements of (f)(1)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer’s trust account. Any funds received in advance of rendering services that do not meet the requirements of (f)(1)-(3) constitute an advance that must be deposited in the lawyer’s trust account in accordance with Rule 1.15(c) until such funds are earned by rendering services. Added March 7, 2016; eff. May 9, 2016.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred inhouse, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or
subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] 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 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 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. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. Exceptions to this provision permit a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure for resolution of fee disputes, such as arbitration or mediation, has been established in the representation agreement, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should submit to it if the client requests. Law may prescribe a
procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

**Reporter’s Notes — 2016 Amendment**

Rules 1.5(f) and (g) are added to clarify the conditions that apply to a lawyer’s acceptance of a nonrefundable fee. The provisions are based on Maine Rule of Professional Conduct Rule 1.5(h)-(i), adopted in June 2014.

Rule 1.5(f) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees pursuant to Rule 1.5(a). Paragraph (f)(1) requires certain safeguards to ensure the client’s informed consent in order to avoid a client’s confusing a nonrefundable fee with an advance. Paragraph (f)(2) prohibits a lawyer from securing a client’s advance waiver of the right to challenge the reasonableness of a fee. A client’s written agreement to a fee is a factor in the determination of its reasonableness under Rule 1.5(a). A lawyer should not press further and request or require the client to waive the client’s right to have the reasonableness of a nonrefundable fee determined in accordance with law. Paragraph (f)(3) provides examples of terminology in the agreement that will indicate that the conditions of the rule are satisfied.

Rule 1.5(g) provides that, without the client’s informed consent to nonrefundability in accordance with Rule 1.5(f)(1), the lawyer must treat the funds as an advance to be credited against future bills for services, must keep such funds in a trust account in accordance with Rule 1.15A until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation pursuant to Rule 1.16. Subdivision (g) also provides that if conditions (f)(1) and (f)(2) are met, nonrefundable fees cannot be deposited in the lawyer’s trust account as those nonrefundable fees are not the property of the client.

**Reporter’s Notes — 2009 Amendment**

V.R.P.C. 1.5 is amended to conform to changes in Model Rule 1.5 but retains the current Vermont provisions of Rule 1.5(d)(1) that permit contingent fees in certain domestic relations matters. See Reporter’s Notes to V.R.P.C. 1.5(d)(1)(1999). In In re Sinnott, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.), the Court held that the PRB could reasonably find that a fee charged pursuant to a boilerplate agreement without regard to work to be performed was not “reasonable” under V.R.P.C. 1.5(a) without the need to consider the factors provided by the rule. In State v. Homeside Lending, Inc., 2003 VT 17, ¶ 33, 175 Vt. 239, 826 A.2d 997, finding that notice in a class action was inadequate, the Court referred to the requirement of ABA Model Rule 1.5(c) (also found in V.R.P.C. 1.5(c)) that a contingent fee agreement must “state the method by which the fee is to be determined.”

The ABA Reporter’s Explanation is as follows in pertinent part:

**TEXT:**
1. **Paragraph (a): Substitute Model Code standard**

   The current rule requires that a lawyer’s fee be reasonable, but it does not state a corollary prohibition of a fee that is larger than reasonable. The omission thus makes it harder than necessary to impose discipline for excessive fees. The Commission substituted the language of the Model Code prohibition for the [former] first sentence of (a). No change in substance is intended.

2. **Paragraph (a): Add explicit prohibition on unreasonable expenses**

   Although ethics committee opinions have assumed that lawyers are prohibited from charging unreasonable expenses, as well as unreasonable fees, the [former] Rule does not say so explicitly. The Commission added language clarifying the lawyer’s obligation, in order both to better educate lawyers as to their duties and to facilitate the imposition of discipline, where applicable. No change in substance is intended.

4. **Paragraph (b): Add scope of representation and expenses to written notice**

   As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee. Further, the Commission believes that issues about expenses are often at least as controversial as those about fees. Indeed, clients often do not distinguish between fees and expenses. Thus, proposed paragraph (b) includes statements about the scope of the representation and client responsibility for expenses as well as fees in the agreement. Changes in the basis or rate of the fee or expenses must also be communicated but not changes in the scope of the representation, which may change frequently over the course of the representation.

6. **Paragraph (c): Clarify that contingent fee agreement must be signed by client**

   The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including “writing.” Because there are only a few instances in which a client’s signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

7. **Paragraph (c): Additional notification regarding expenses in contingent fee agreements**

   Unlike the Model Code, the Model Rules permit lawyers to advance litigation expenses, with repayment contingent on the client prevailing. Nevertheless, lawyers are not required to make such repayment contingent. The Commission believes that clients may be misled without a clear
statement, in the contingent fee agreement, that there are expenses for which the client will be liable whether or not the client is the prevailing party.

8. **Paragraph (e): Division of fees**

The Commission recommends retaining the current text of this Rule, with the sole exception that the client must agree, and the agreement must be confirmed in writing, to the participation of each lawyer, including the share of the fee that each lawyer will receive.

**COMMENT:**

[1] This Comment is entirely new. It introduces paragraph (a) by stating that lawyers must charge both fees and expenses that are reasonable under the circumstances. It explains that the factors set forth in paragraphs (a)(1) through (8) are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in-house, along the lines suggested in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).

[3] This Comment is entirely new. It confirms that contingent fees, like other fees, are subject to the reasonableness standard of paragraph (a), including consideration of all of the factors that are relevant under the circumstances. It further refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. (This is a revision of the last sentence in former ABA [Comment [3] [third paragraph of former Vermont Comment], revised to include an additional reference to ceilings on the percentage allowable under law.) It also refers to applicable law that may govern situations other than a contingent fee.

[4] This amendment to [former ABA] Comment [2] [second paragraph of former Vermont Comment] eliminates the vague “special scrutiny” language and substitutes a cross-reference to the Rule 1.8(a) requirements for business transactions with a client when a fee is to be paid in property instead of money. Rule 1.8(a) treatment is not stated in absolute terms, but the possibility is strongly suggested. The recent ABA Business Law Section report on alternative billing practices agreed that Rule 1.8(a) treatment should be given to fees paid in stock or property.

[5] The Commission proposes to delete the next to the last sentence of [former ABA] Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative.

[6] A number of ethics committee opinions have interpreted the current Model Rule to permit contingent fees in post-decree family law matters, i.e., collecting arrearages that have been reduced to judgment, because such fee arrangements do not implicate the same policy matters that are implicated when fees are contingent upon securing a divorce or on the amount of alimony, support or property order. [The former Vermont provisions permitting this practice are retained.]
The changes reflect the changes made to paragraph (e). The Commission proposes revising the explanation of “joint responsibility” to entail legal responsibility, including financial and ethical responsibility, as if the lawyers were associated in a partnership. This is the interpretation that has been given to the term according to ABA Informal Opinion 85-1514, as well as a number of state ethics opinions.

This new Comment seeks to eliminate a misunderstanding that might arise about whether the requirements of paragraph (e)(1) must be satisfied when a lawyer leaving a law firm and the firm agrees to share some part of a fee to be received in the future. Technically, the future division would be between lawyers who were no longer members of the same law firm. None of the usual reasons for requiring the client’s agreement to the arrangement apply to such fee divisions, however, and this Comment is intended to make that clear.

The proposed change highlights that lawyers must comply with fee arbitration or mediation procedures in jurisdictions where they are mandatory. Reporter’s Notes This rule substitutes a prescription that a lawyer’s fee be reasonable for the former Code’s proscription of illegal or clearly excessive fees. In addition, the rule provides that where the lawyer has not regularly represented the client, the fee basis shall be communicated to the client, preferably in writing, before or within a reasonable time after the representation has begun. The rule also differs from the Code by requiring rather than merely recommending that contingent fee agreements be in writing. Subsection (d) departs from the former Code and the ABA Model Rules in specifically allowing contingent fees in certain domestic relations matters. The change was prompted by the study committee’s concern that, in many instances, there is no practical way for families to recover support and maintenance arrearages due unless lawyers are allowed to take these cases on a contingency basis. An ethical issue is raised if a custodial parent, in order to collect any support dollars, contracts away a portion of those dollars which are due for the benefit of the child. By requiring court approval of such contingency fees, as is presently allowed in personal injury cases involving minors, it is expected that the interests of the child will be fairly protected. Subsection (e) permits fee division between lawyers not in the same firm, as long as the fee is reasonable, the client consents, and the fee is in proportion to the services performed or in proportion to the responsibility assumed by each lawyer. The Vermont Code permits such division, so long as the fee is reasonable, the client consents, and the fee is in proportion to services performed and in proportion to the responsibility assumed. Thus under the rules, but not under the Code, a referral fee is permitted in limited situations. The comment calls for arbitration of fee disputes. Lawyers may fulfill this aspirational directive by submitting a dispute to the Vermont Bar Association’s Fee Arbitration Committee or by seeking arbitration under the Vermont Arbitration Act, 12 V.S.A. §§ 5651-5681.

ANNOTATIONS

1. **Written fee agreement.** Respondent committed professional misconduct in failing to put a contingent fee agreement in writing. Although the complainant was physically unable to sign one, no signature was required under the rule at the time; even if a signature had been required, there were avenues available to obtain some kind of written approval from the complainant; and there was much concerning the fee agreement that was unclear to both respondent and the complainant. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.
2. **Excessive fee.** Facts supported the panel’s finding that respondent, however erroneously, believed that he would contribute to a greater degree to complainant’s case. Because he was not consciously aware that he would do very little work for a large fee, his actions in charging an excessive fee were negligent. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461. Respondent’s agreement to a 12 percent contingent fee for facilitating communication between the complainant and another attorney was misconduct. Respondent’s role did not require a large investment of time or labor; his tasks did not require specialized legal knowledge or legal experience; and facilitating communication would not preclude respondent from accepting other employment. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461. In determining that respondent charged an excessive contingent fee, it was irrelevant that respondent did not actually bill the complainant for the contingent fee. In contracting with the complainant for 12 percent of the complainant’s recovery, respondent attempted to violate the directive that lawyers charge a reasonable fee, which was a violation of the rule stating that it was unprofessional conduct for a lawyer to attempt to violate the Rules of Professional Conduct. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

3. **Sanctions.** Public reprimand was an appropriate sanction for an attorney who knowingly failed to put a contingent fee agreement in writing and who negligently attempted to charge an unreasonable 12 percent contingent fee for facilitating communication between the complainant and another attorney. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461. Cited in In re Sinnott, 2004 VT 16, 176 Vt. 596, 845 A.2d 373 (mem.).
Rule 1.15. SAFEKEEPING PROPERTY

(a) (1) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in accordance with Rules 1.15A and B. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(2) For purposes of these rules, property held “in connection with a representation” means funds or property of a client or third party that is in the lawyer’s possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. “Fiduciary relationship” includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(b) A lawyer may deposit the lawyer’s own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount reasonably necessary for that purpose. Amended March 7, 2016; eff. May 9, 2016.

(c) Unless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), a lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer’s possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred. Amended March 7, 2016; eff. May 9, 2016.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g): (1) a lawyer shall not disburse funds held for a client or third person unless the funds are “collected funds.” For purposes of this rule, “collected funds” means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account. (2) a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.
(g) In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer’s trust account within a reasonable period of time:

1. When the deposit is either a certified check, cashier’s check, money order, official check, treasurer’s check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or

2. When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V. S. A. Chapter 41; or

3. When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or

4. When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction; or

5. When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

(h) If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer’s other clients or third persons held by the lawyer in accordance with this rule. — Amended Dec. 21, 2004, eff. March 1, 2005; June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer’s business and personal property and, if monies, in one or more separate accounts. Separate accounts are to be used when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with the provisions of Rules 1.15A and B.

[2] While normally it is impermissible to commingle the lawyer’s own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay service charges or other fees on that account. Accurate records must be kept regarding which part of the funds are the lawyer’s.

[3] Lawyers often receive funds from which the lawyer’s fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer
may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer’s custody, such as a client’s creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyer’s fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Reporter’s Notes — 2016 Amendment

Rule 1.15(b) is amended to provide that the funds that a lawyer may keep in a client trust account to cover service charges is that amount “reasonably” necessary for that purpose, making clear that the rules do not provide a fixed amount or percentage but will be applied on a case-by-case basis.

Rule 1.15(c) is amended for consistency with the simultaneous addition of Rules 1.5(f) and (g).

Reporter’s Notes — 2009 Amendment

V.R.P.C. 1.15 is amended in part to conform to changes in Model Rule 1.15, retaining a reference in V.R.P.C. 1.15(a) to V.R.P.C. 1.15A and B, for which there are no Model Rules equivalents, and incorporating as V.R.P.C. 1.15(f)-(h) the 2005 amendment adding V.R.P.C. 1.15(d)-(f) concerning client trust funds against which checks may be drawn. See Reporter’s Notes to V.R.P.C. 1.15 (1999); Reporter’s Notes to 2005 amendment of V.R.P.C. 1.15.

The Supreme Court addressed issues under V.R.P.C. 1.15 in In re Farrar, 2008 VT 31, 183 Vt. 592, 949 A.2d 438 (mem.) (admitted commingling of client funds contrary to V.R.P.C. 1.15(a) requires public reprimand in light of importance of protecting client funds and potential for actual injury to client, despite lawyer’s unawareness that conduct violated rule), and In re Sinnott, 2004 VT 16, ¶ 18, 176 Vt. 596, 845 A.2d 373 (mem.) (former V.R.P.C. 1.15(c) [now (d)] did not apply to fees paid directly to the lawyer by the client).
Rule 1.15(a)(2), unique to the Vermont rule, is added as part of a group of amendments to Rules 1.15A and B intended to clarify the applicability of Rules 1.15, 1.15A and B to funds held by a lawyer other than in a professional capacity. “Property held in connection with a representation,” the key phrase in what is now Rule 1.15(a)(1) that determines the applicability of those rules, is now limited to property held in connection with a representation in a lawyer-client relationship or a fiduciary relationship that arises out of a lawyer-client relationship or a court appointment. Rule 1.15A(a) as amended makes clear that these rules govern both “trust” accounts, in which client funds arising from a representation are held, and “fiduciary” accounts, in which funds arising from a fiduciary relationship are held.

Note that new Rule 1.15(c) requires deposit in a lawyer’s trust account of any fees or expenses paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered or reimbursement for expenses subsequently incurred. The rule does not require deposit in the trust account of a “pure” retainer, a flat fee paid to assure the lawyer’s availability and not for performing services. If services are also to be performed, an additional agreement at a specified rate for those services is required, and any advance payment under that agreement must be deposited in the trust account. Either form of agreement is, of course, subject to the overriding requirement of Rule 1.5(a) that fees must be reasonable.

The ABA Reporter’s Explanation is as follows:

TEXT:

1. Paragraph (b): Deposits to minimize bank charges The Commission heard testimony that in some jurisdictions lawyers are unable to avoid bank charges unless they are permitted to deposit money in a client trust account to cover such charges. The addition of this new paragraph is designed to address that problem.

2. Paragraph (c): Advance payment of fees and expenses This new paragraph provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses. The Commission is responding to reports that the single largest class of claims made to client protection funds is for the taking of unearned fees.

3. Paragraph (e): Expand to cover all instances of disputed funds 76 [Former] Rule 1.15(c) is presently written to cover disputes between the lawyer and “another person,” usually the client. The change proposed recognizes that at least three kinds of disputes are in far more general language, tightens the first two sentences into one and reiterates the lawyer’s duty to pay over undisputed sums. The final additional sentence clarifies the lawyer’s duty to promptly distribute all portions of the property that are not subject to dispute.

COMMENT:

[1] Consistent with the Commission’s action with respect to Rule 1.18, a phrase has been added to make clear that prospective clients are included among the third parties to whom the lawyer owes a duty to protect property pursuant to this Rule. While the black letter of this Rule is written in mandatory
terms, the Comments are often permissive. Sometimes that may be appropriate, as where a safe
deposit box is suggested unless something else is warranted by the circumstances. When the issue is
close, permissive language has been retained. However, Rule 1.15(a) clearly requires that client
property, including money, be kept separate from the lawyer’s own, and the Comment has been
changed to make that clear. A sentence has been added to provide guidance to lawyers regarding the
proper maintenance of trust accounts [in accordance with V.R.P.C. 1.15A and B].

[2] This new Comment addresses new paragraph (b).

[3] This Comment deals with handling client funds that may be set aside for payment of fees. The
[former] language refers only to funds received from third parties, whereas the usual payer will be the
client. Further, the lawyer should not have to show that the client is in fact likely to leave town if,
pursuant to agreement, the lawyer is entitled to have the security of funds paid over before the fee is
actually earned. In addition, as in Comment [1], the clear Rule 1.15(a) and (e) requirements that
disputed client funds be kept in a separate account is made mandatory rather than permissive.

[4] This Comment deals with a practical problem in which a client’s creditor tries to get at funds in the
hands of the lawyer. There is no doubt that, as a matter of substantive law, in some cases the lawyer
would be required to make the creditor whole if the lawyer remitted property to the client to which the
creditor was found entitled. In those, but only those, cases, paragraph (e) mandates a lawyer’s refusal to
remit the funds to the client until the dispute is resolved, while this Comment reinforces and tries to
explain this sometimes controversial point. The Comment further explains that the lawyer’s duty to
protect client creditors only exists when the creditor has a claim against specific funds being held by the
lawyer and that the lawyer’s duty to protect the third party exists only when there is a nonfrivolous
claim under applicable law. When there are substantial grounds for dispute as to the person entitled to
the funds, the lawyer may file an action to have a court resolve the dispute.

[5] These changes clarify that when a lawyer holds funds in a capacity other than as a lawyer
representing a client, this Rule does not apply. [6] The change to “lawyers’ fund for client protection”
reflects the current nomenclature for these funds. The new language in the second sentence indicates a
lawyer has an obligation to contribute to these funds in jurisdictions where they are mandatory.

Reporter’s Notes — 2005 Amendment Rules

1.15(d)-(f) are added to address a problem that has arisen as a result of a recent Advisory Ethics Opinion
of the Vermont Bar Association’s Professional Responsibility Committee (VBA Ethics Opinion 2002-4,
published April 2004). The opinion concluded that “Trust account checks can only be drawn on client
funds after the deposit on which the check is drawn clears” based on the Committee’s reading of
V.R.P.C. 1.15(b) and other provisions of the Rules of Professional Conduct. Id. While the opinion does
not have binding legal effect, it is of sufficient persuasive force to put lawyers who ignore it at risk. The
impact is thus significant in the many real estate closings, tort settlements, and other transactions in
which funds for clients pass through lawyers’ hands. If the lawyer cannot disburse such funds until the
checks with which they have been transmitted have cleared, clients will experience significant delays in
receiving funds to which they are entitled, and sequential transactions, such as the simultaneous sale
and purchase of real estate, will be hindered. See, generally, R. Kohn, “Trust Account Ethics Rules: Sensible, Bizarre, or a Combination?,” 30 Vt. Bar Jour., No. 2, pp. 20-26 (2004). The present rule is based on provisions adopted in other states to address this problem. See, e.g., Del. Lawyers’ Rules of Prof’l. Conduct, R. 1.15(n); Rules Regulating the Fla. Bar, R. 5-1.1(i).

Rule 1.15(d) sets forth two basic principles that must be adhered to unless the exceptions set forth in Rule 1.15(e) apply:

(1) A lawyer may not disburse funds unless the disbursement is drawn against “collected funds” — i.e., those that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account. (Under present banking practice, there is no way a lawyer can be certain that funds have been finally settled, because the bank into which the check has been deposited is only notified when a check is dishonored, not when it is honored. As of August 2004, in accordance with Federal Reserve Board Regulation CC, checks drawn on banks within the same Federal Reserve Board region are usually honored by the banks on which they are drawn within two or three business days, and checks drawn on banks in other regions are usually honored within seven business days, except in extremely unusual circumstances. Accordingly, as of August 2004, it will usually be reasonable for a lawyer to believe that a check has been finally settled three business days after deposit for checks drawn on banks within the same Federal Reserve Board region, and seven business days for checks drawn on other United States banks.)

(2) A lawyer may not use the funds of one client or other person held in trust to serve the needs of another client or person without full disclosure and permission of the owner. VBA Ethics Opinion 2002-4 essentially stands on the ground that a check drawn against uncollected funds in a trust account is in fact drawn against the collected funds of other clients that are held in the account.

The exceptions to these basic principles set forth in Rule 1.15(e) are based on the premise that certain categories of trust account deposits carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Four of the five categories of deposits enumerated in paragraph (e) reflect instruments issued by or drawn on sources of assured financial stability so that the likelihood that the instrument will be dishonored or that the deposit will otherwise fail is so slight that it may be treated as presumptively “collected.” The fifth category, personal checks aggregating $1,000 or less, covers the need for last minute funds to cover minor and unanticipated closing costs and is a de minimis amount that can be readily repaid in the event of failure. The five categories in effect create “safe harbors” that allow the lawyer to draw against these uncollected funds, provided that the further requirement of paragraph (e) is met — that the lawyer “reasonably believes” that the instrument or instruments in question will clear and become “collected funds” in a reasonable time. (See discussion of clearance times above.) The essence of the rule is that a lawyer who draws against uncollected funds other than those within the safe harbors of paragraph (e) is in violation of the basic prohibitions of paragraph (d) and is thus subject to disciplinary action.
Rule 1.15(f) adds the further requirement that if a deposit fails, even though it was within one of the categories set forth in paragraph (e) and the lawyer’s belief that it would clear was reasonable, the lawyer must take immediate steps to protect the funds of other clients that are thus drawn upon — presumably by immediately making or securing reimbursement of the trust account to the amount of the failed deposit.

**COMMENT:**

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there are risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

A “client’s security fund” provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

**Reporter’s Notes**

This rule was modified, and the next three rules added, in order to include mandatory IOLTA, random auditing, the financial support for random auditing, and reporting of overdrafts.

**ANNOTATIONS**
1. **Admonition.** When respondent held trust account checks payable to her firm for premiums owed to the firm without cashing the checks, thereby improperly commingling her funds with those of third parties, an admonition by Disciplinary Counsel was appropriate. No funds belonging to clients or third parties were improperly used; there were mitigating factors of lack of selfish or dishonest motive, no prior disciplinary record; a good faith effort to rectify the consequences of the violation, a full and free disclosure to disciplinary counsel, cooperation, and remorse; and the only aggravating factor was respondent’s substantial experience in the practice of law. In re PRB Docket No. 2013.160, 2015 VT 54, __Vt., __ 1.3d – (mem.).

Sanction for commingling personal and client funds in respondent’s client trust account was reduced from a public reprimand to a private admonition when respondent went beyond what was required of him, including hiring an accountant at his own expense and disclosing far more information than was required, when other mitigating factors included absence of a prior disciplinary record, lack of selfish or dishonest motive, presence of personal problems, positive character and reputation, presence of physical disability, and remorse, and when the only aggravating factor was respondent’s 30 years of experience. In re PRB Docket No. 2012.155, 2015 VT 57, __ Vt.__, __ A.3d __ (mem.).

Respondent violated the professional conduct rules regarding client funds and trust accounting systems by not fully documenting each transaction in her trust account on her check register, not having a single source to which she could go to identify all transactions, placing earned fees into her trust account, and having no documentation for a $3,000 electronic transfer from her trust account. Admonition was a proper sanction, as respondent’s negligence in the management of her trust account arose out of ignorance of the rules, no client or third party was injured, and there was little potential injury; furthermore, there were several mitigating factors and no aggravating factors. In re PRB Docket No. 2014.168, 2015 VT 9, __ Vt. __, 114 A.3d 480 (mem.).

Admonition was appropriate when respondent failed to regularly reconcile his trust accounts, failed to maintain a central trust accounting system, and placed unearned fees in his operating account. His mental state was one of negligence and no client had been injured; there were mitigating factors in that he lacked dishonest or selfish motive, immediately took steps to revise his trust accounting system, and had cooperated with disciplinary proceedings; and in aggravation, he had substantial experience in the practice of law and three prior disciplinary offenses that were remote in time and unrelated to the present charges. In re PRB Docket No. 2013.153, 2014 VT 35, 196 Vt. 633, 96 A.3d, 468 (mem.).

2. **Bank fees.** Rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees provides neither an appropriate dollar amount nor a method for its calculation; before attorneys are disciplined under this rule for holding small amounts of money in their trust accounts, they need specific standards. This lack of guidance is better remedied by rule change than by panel decision. In re PRB Docket No. 2014.133, 2015 VT 63, __ Vt., __, __ A.3d__ (mem.).
3. Respondent had not violated the rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees, as the rule provided no guidance as to what amount was proper and the panel was not prepared to find that the $157.57 deposited here violated the rule. In re PRB Docket No. 2014.133, 2015 VT 63, __ Vt., __, A.3d__(mem.). 3. Reprimand. Based on respondent’s negligent mental state, the lack of actual injury, and the low potential for injury, a public reprimand was the presumptive sanction when respondent commingled personal and client funds in his client trust account. In re PRB Docket No. 2012.155, 2015 VT 57, __ Vt. __, __ A.3d__(mem.).
Materials links:

Rule 1.5:  https://files.acrobat.com/a/preview/7247b486-6a10-40f2-948a-109038ca2d87

And rule 1.15:  https://files.acrobat.com/a/preview/2063f08a-8ef1-4d39-96d3-1530cbab58d9