

Ethical Use of Alternative Fee Arrangements (Flat Fees)

DISCIPLINARY COMMISSION
OPINION #2-25

Introduction

With today's ever-changing legal market, many lawyers and law firms have incorporated alternative fee arrangements (AFAs) into their legal practice instead of relying solely on the traditional hourly billable model. AFAs include contingency fees, flat fees, retainers/subscription fees, and structured fee agreements and can be implemented effectively while adhering to the Indiana Rules of Professional Conduct. For purposes of this Advisory Opinion, the focus is on flat fee agreements.

A flat fee is a fixed fee for future legal services that a lawyer charges for all services related to a particular matter or for a specific component of legal services (e.g. drafting a will or defending a client in a criminal case through trial or a plea). Flat fees are often beneficial to clients and lawyers alike, as such agreements provide certainty about the fee to clients and ensure that lawyers will be paid.

Question

How can lawyers ensure their flat fee agreements comply with the duty to charge reasonable fees?

Short Answer

While flat fee agreements are a set fee for agreed future legal services to be completed, lawyers may treat the fees as fully earned upon receipt and need not segregate the advance payment in an IOLTA trust account, as with other fees.¹ [*In re Stanton*, 504 N.E.2d 1 \(Ind. 1987\) \(“Stanton II”\).](#) However, the fees must be reasonable, and lawyers are required to refund unearned fees to their

¹ Flat fees differ from “advance fees” because the lawyer and client agree to a set amount to complete the legal services or to complete a specific component of the legal services, regardless of the resulting simplicity or complexity of the matter. [*In re Kendall*, 804 N.E.2d 1152, 1157 \(Ind. 2004\)](#). In contrast, an “advance fee,” such as a retainer for a specific legal matter, allows a client to pay an upfront amount that the lawyer deducts from as billable hours are completed. [*In re O’Farrell*, 942 N.E.2d 799, 803 \(Ind. 2011\)](#). Under such agreements, the total cost of the entire legal project may be more or less than the retainer, depending on how many hours the lawyer must dedicate to the legal matter. As such, specific retainers are not earned upon receipt and must be placed in a lawyer’s trust account until the lawyer performs legal services and earns the fees. [*Kendall*, 804 N.E.2d at 1157-58](#).

clients if the purpose of the agreement is not achieved. [*In re Stanton*, 492 N.E.2d 1056,1061 \(Ind. 1986\)\(“*Stanton I*”\)](#). Therefore, to the extent there remains work outstanding that was within the scope of the original flat fee agreement, there are unearned fees which must be returned to the client. [*In re Kendall*, 804 N.E.2d 1152, 1160 \(Ind. 2004\)](#).

Recommended Rules for Review

[Indiana Rules of Professional Conduct; 1.4, 1.5, 1.16](#)

[*In re Stanton*, 492 N.E.2d 1056 \(Ind. 1986\)](#)

[*In re Stanton*, 504 N.E.2d 1 \(Ind. 1987\)](#)

[*In re Kendall*, 804 N.E.2d 1152 \(Ind. 2004\)](#)

[*In re O’Farrell*, 942 N.E.2d 799 \(Ind. 2011\)](#)

Summary

The following general rules should be considered:

- 1) A fee is considered a flat fee when the payment is intended to purchase a distinct legal service or representation for a fixed amount. [*Kendall*, 804 N.E.2d at 1157](#).
- 2) Lawyers’ fees for services, even flat fees, are required to be reasonable for the legal services performed for their clients. Indiana Professional Conduct Rule [1.5\(a\)](#).
- 3) A lawyer must communicate clearly the scope of the representation and the basis of the fee to the client and provide adequate explanation of the fee agreement such that the client can make an informed decision about the client’s choice of representation to comply with Indiana Professional Conduct Rules [1.5\(b\)](#) and [1.4](#).
- 4) To comply with Indiana Professional Conduct Rule [1.4](#), lawyers should communicate to their clients that flat fees are not refundable except for failure to perform the agreed upon legal services.
- 5) Lawyers are required to protect their clients, even after termination of the legal representation, and refund any advance payment of fees or expenses that have not been earned upon termination. Indiana Professional Conduct Rule [1.16\(d\)](#).
- 6) Flat fees are not required to be segregated from the lawyer’s funds, as required under Indiana Professional Conduct Rule [1.15\(a\)](#), because flat fees are deemed to be earned upon receipt. [See *Stanton II*, 504 N.E.2d at 1](#).
- 7) Lawyers are required to refund all unearned fees, even with flat fees, if the lawyer’s services are terminated, for any reason, before the agreed-upon services are fully performed. Indiana Professional Conduct Rules [1.5\(a\)](#), [1.16\(a\)](#); *see also* [*Kendall*, 804 N.E.2d at 1160](#).
- 8) Flat fees are fully earned by the attorney when the bargained for legal services are completed.

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Nonrefundable Provision

Hypothetical # 1 – Lawyer A is a member of a local district’s Pro Bono Commission and actively participates in providing pro bono legal services to the local community. Lawyer A learns that a nearby district has great legal need, but few lawyers. Lawyer A would like to help but cannot afford to provide no-cost services and absorb the travel costs. A colleague suggests that Lawyer A explore the use of low-cost flat fees. Lawyer A then drafts a form agreement to use with clients in the district for basic legal services, such as representation to obtain or challenge a protective order. The drafted agreement provides that the \$500 fee is nonrefundable, regardless of the outcome. Lawyer A shows the drafted agreement to the colleague, and the colleague expresses concern that the agreement violates the Rules of Professional Conduct. Is Lawyer A’s colleague correct?

Yes. If Lawyer A uses the agreement as drafted, Lawyer A would violate Indiana Professional Conduct Rule [1.5\(a\)](#)’s proscription against unreasonable fees by including language that the fee is nonrefundable without clarification. Although flat fees are treated as earned upon receipt and are not subject to the segregation and recordkeeping requirements in Indiana Professional Conduct Rule [1.15\(a\)](#), lawyers still must return unearned fees if the bargained for services are not completed. [Kendall, 804 N.E.2d at 1160](#); see also Rule [1.16\(d\)](#). Even if a lawyer does not attempt to enforce the nonrefundable fee provision, the agreement still would be a violation of Rule [1.5\(a\)](#) because the nonrefundable language could chill a client from exercising the right to terminate the lawyer’s services. [In re O’Farrell, 942 N.E.2d 799, 806 \(Ind. 2011\)](#).

A better practice would be to draft the fee agreement to advise clients that the flat fee is nonrefundable “except for failure to perform the agreed legal services.” [Kendall, 804 N.E.2d at 1160](#). This provision provides the client with assurance as to the cost of completed legal services but communicates that the client is entitled to a refund of unearned fees should the attorney-client relationship need to be terminated prior to completion of the services.

Ethical Minefield #2 – Unearned Fees (Termination of Agreement)

Hypothetical #2 - Lawyer A revises her flat fee agreement to include the clarification language regarding when fees are refundable and successfully

represents a number of clients in the nearby district. New Client X hires Lawyer A to represent her on a protective order matter, and the fee agreement provides that Lawyer A will represent Client X “throughout the proceedings.” Lawyer A drafts and files a petition for a temporary protective order on Client X’s behalf, which is granted. The opposing party challenges the temporary protective order and requests a hearing. Client X, unhappy that a contested hearing has been set, discharges Lawyer A, hires another attorney, and requests a refund of any unearned fees. Lawyer A has expended more than \$500 worth of time on this matter. Does Lawyer A have to return any of the fees?

Yes. Because the agreement contemplated Lawyer A’s representation of Client X throughout the protective order proceedings without limitation, the legal services are not complete, and Lawyer A must return some of the flat fee.² If Lawyer A had intended that the \$500 flat fee only covered the filing of a protective order, the better course would have been to write more specific language regarding the expectations of the representation, possibly through a structured fee agreement.

For example, to provide more clarity, Lawyer A could have written the agreement to inform Client X that Lawyer A would charge a set flat fee of \$500 for the filing of the protective order but that the flat fee would be \$1,250 if the opposing party requested an evidentiary hearing and Lawyer A was required to represent Client X at the hearing. Such clarification provides the client with more information to make a reasoned choice about the representation and is in keeping with a lawyer’s duty to communicate under Indiana Professional Conduct Rules [1.4](#) and [1.5\(b\)](#).

Ethical Minefield #3 – Substantial Performance

Hypothetical #3 – Client Y hires Lawyer B to negotiate a plea agreement in a major felony criminal case for a flat fee of \$12,000. This is a reasonable fee, and Client Y assures Lawyer B that Client Y wants to resolve the criminal charges with a plea agreement if the judge does not rule in Client Y’s favor on a motion to suppress. Lawyer B includes a provision in the fee agreement that states that the fee is nonrefundable except for failure to provide the agreed upon service to file a motion to suppress and, if necessary, negotiate a plea agreement. After Client Y’s motion to suppress is denied, Lawyer B negotiates a plea agreement

² When the legal services have not been completed, the lawyer is entitled to compensation in *quantum meruit* for the value of services already rendered. The calculation must be reasonable in relation to the percentage of work performed compared to what remains to be done. An inventory of billable hours showing that the lawyer has “earned” the entire flat fee is not reasonable and violates Rule 1.5. See *O’Farrell*, 942 N.E.2d at 807.

that Client Y initially views in a favorable light. Client Y formally accepts the plea agreement, and the agreement is filed with the court. Prior to sentencing, Client Y informs Lawyer B that Client Y wants to withdraw the plea agreement and hire another attorney to see if Client Y can get a better plea deal. Lawyer B withdraws his appearance in the case. Client Y eventually accepts a similar plea agreement to the one negotiated by Lawyer B. Has Lawyer B fully earned the flat fee?

Whether the flat fee is fully earned depends upon the degree to which the lawyer has completed the services the lawyer agreed to perform. Here, in contrast to the previous hypothetical, Lawyer B fully earned the flat fee since Lawyer B substantially performed the agreed upon service that had been detailed in the fee agreement. Accordingly, Lawyer B will not have to return a portion of the fee to Client Y. Lawyer B charged a reasonable legal fee for the service provided, properly advised the client that a refund was possible if Lawyer B failed to perform that service, and then performed that service by negotiating a favorable plea agreement. Client Y's change of heart regarding the plea agreement does not negate the fact that Lawyer B upheld the original bargain entered into by Client Y and Lawyer B. Lawyer B is under no obligation to return any portion of the flat fee to Client Y.

Ethical Minefield #4 – Unforeseen Circumstances

Hypothetical #4 – Client Z hires Lawyer B to represent him in a dissolution matter for a \$10,000 flat fee. At mediation, Client Z reveals for the first time that he has a significant 401K plan with a former employer. The matter settles at mediation, and the judge accepts the settlement terms and issues the decree. The settlement agreement provides that Lawyer B will draft the QDRO transferring a portion of Client Z's 401K from the former employer to Client Z's now ex-wife. Does Lawyer B have to draft the QDRO as a part of the original flat fee or can Lawyer B charge an additional fee for the drafting?

It depends. This is another instance when a written fee agreement, with a clearly laid out scope of representation, would be helpful for both Client Z and Lawyer B. If the fee agreement is silent regarding the scope of employment, and Lawyer B signed off on the settlement agreement stating that he would draft the QDRO, it is likely included within the original \$10,000.

On the other hand, if Lawyer B had a vigorous intake process to discern what financial assets and legal services may be involved before setting the flat fee, and Client Z intentionally withheld

information about the 401K (thinking that his wife did not know about the account), then Lawyer B would have a better argument that this was an unforeseen circumstance and that an additional fee is necessary.³

Better still, Lawyer B could avoid this situation by including a provision in the initial fee agreement that the fee is for legal services based on the financial information provided by the client on the intake worksheet and that if a QDRO needs to be drafted, there will be an additional set fee. Then, Lawyer B would be entitled in this scenario to collect an additional fee for the drafting of the QDRO and could withdraw if Client Z refuses to pay the fee.

Ethical Minefield #5 – Recouping Capital Expenditures

Hypothetical #5 – Partner C authorized the purchase of a closed AI software system that will be utilized for legal research, document production, and drafting pleadings at Partner C’s small law firm. The purchase was a significant capital expenditure for the firm, and Partner C wonders if the firm could recoup the expense by adding an additional \$1,000 charge to all flat fee agreements for cases in which lawyers at the firm will use AI. Are there any ethical issues with Partner C’s contemplated practice?

It depends. Here, the question is whether the additional \$1,000 surcharge is a reasonable expense. Indiana Professional Conduct Rule [1.5\(a\)](#) provides a list of items for lawyers to consider when evaluating whether a fee or expense is reasonable. If the use of AI significantly improves the firm’s ability to search resources that normally are not easily accessible so that the firm’s lawyers can make more refined legal arguments, and the client agrees to the use of AI and the additional expense, then the surcharge might be appropriate. However, these factors must be balanced with the time savings that the firm receives by using an AI system.

In the above scenario, without additional information, it is likely that Partner C’s plan is inconsistent with Rule [1.5](#) because Partner C’s sole reason for the surcharge is to recoup the capital expenditure. While certain expenses, such as procuring a court reporter for a deposition, can be passed to the client, overhead expenses for ordinary office maintenance, such as maintaining a library, obtaining malpractice insurance, renting office space, and paying utilities, cannot be assessed as a surcharge. ABA Formal Ethics Opinion 93-379, p. 7 (1993). With respect

³ Lawyers are also reminded that if there are vague terms in a fee agreement or unforeseen circumstances arise that require renegotiation of the agreement, lawyers must adhere to Indiana Professional Conduct Rule [1.8\(a\)](#) during such negotiations. Not only must the new terms be reasonable and agreed to by the client in writing, but the client must be informed in writing about the new terms and afforded the opportunity to consult with independent counsel before entering the new agreement. [In re Lauter, 933 N.E.2d 1258, 1262 \(Ind. 2010\)](#).

to AI tools, to the extent that the tool “functions similarly to equipping and maintaining a law practice,” a lawyer or law firm should consider the tool to be overhead and not pass the expense to the client, absent advance disclosure and agreement by the client to the expense. ABA Formal Op. 512, p. 13 (2024).

In short, the best approach is to discuss with clients the advantages (and any potential disadvantages) of using a particular AI tool and to explain any added benefits that the tool provides that would justify a surcharge.

Conclusion

Flat fees are permitted under the Indiana Rules of Professional Conduct if the fees are reasonable. Flat fees provide certainty to the client on the amount the client will pay for the legal services and secure payment for the lawyer. When charging a flat fee, lawyers should ensure that their clients are adequately informed about what services the lawyer is providing for the flat fee. Similarly, lawyers must keep in mind that they owe the client a fiduciary duty to protect the client’s interest, even if the client terminates the representation before services are completed. This fiduciary duty requires the lawyer to refund any unearned portion of the flat fee.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.