# Fee Agreement Fumbles

## Top 10 Mistakes Lawyers Make on Their Fee Agreements

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# Introduction

Remember back to your 1L year Contracts course or studying for the bar exam. The purpose of a contract is to have a meeting of the minds, where both parties fully understand what will happen. A well written contract is supposed to anticipate problems (e.g. breach of contract, acts of God) before they occur and avoid conflict by giving a procedure for resolution in most cases (e.g. arbitration, partial payment and termination).

Your representation/fee agreement is a contract—arguably one of the most important contracts a lawyer has in her practice. It governs the relationship between the client and the lawyer, setting the stage for how a case will proceed and the ground rules each will abide under. This article helps anticipate some often-unanticipated circumstances in representation—sticking points between client and lawyer—and suggests tweaks to make to your standard fee agreement to clarify the relationship and avoid problems before they occur. That's right—I've put in sample clauses you can use (usually two per issue) for the top 10 issues I see in fee agreements.

## 1. Strike the Right Tone

Lawyers are smart. It is probably in the unwritten job description of every client that they find their lawyer smart. But lawyers don't sound smart in writing by writing in a lawyerly fashion. They sound smart by making complex things simple for everyday people. Legalese really is a bad word. Don't use it in your writing. Choose clear, concise words that every client can follow, so their eyes don't instantly glaze over when they read it. This document should be a reference guide for both parties in how to proceed in the relationship being established.

It comes down to audience. Your audience is three-fold: potential clients, successor lawyers (if there are any), and defending yourself against bar complaint or malpractice actions. Clear language helps with every one of them. But the client is arguably the most important audience—they will look at it the most, and the other audiences can often be avoided if the agreement is clear enough that no disputes arise.

Sometimes I have a lawyer say, "Well my clients are very sophisticated. They want their money's worth. That's why I write this way." Go ask them whether they think confusing contracts communicate value to them, right now. Go. I bet it doesn't.

## 2. Craft a Stellar Scope of Representation

Lawyers get a bad rap in society, as being expensive and opaque about process and price. Overcome these stereotypes in your writing. Think of your fee agreement as the second wave of your pitch to get the client. You had a consultation with them where you charmed them and determined they have a chance at a form of relief you can help them try to access. Now your job is to help them understand what that will entail (i.e., what legal services really are). You can't begrudge clients thinking you only fill out forms for them if your fee agreement says something like "I will file an I-130 for you." Put all the nuances of legal services in there, such as "counsel you on your rights and responsibilities," "dissect the merits of your case," and "lay out legal strategies for you to attain your goal of *x*." Show them the analysis and work that goes into the scope or representation, and make it complete, so both of you know the work at stake here.

The scope of representation can be a bulleted list of steps or phases in the case timeline. Avoid acronyms and use plain language to make the steps understandable to the potential client.

"The scope of my representation will begin with my review of the written information you supplied me at our meeting. As I understand it now, you would like the process to culminate in the following.

- Explaining your options to reach your goal of becoming a citizen
- Working with you and others to collect the appropriate information for a citizenship application
- Preparing forms with you for an adjustment of status, reviewing your answers and helping correct errors and omissions
- Working with you (and sometimes others) to collect supporting documentation
- Writing a detailed cover letter and preparing the filing
- Preparing you for the interview and attending with you, if necessary

- Keeping you updated on the status of your case, phone calls and meetings between us, and
- Informing you of the government's decision on your adjustment of status."

## 3. Tell Them What *Isn't* Included

"A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." ABA Model Rule 1.2(c). Every representation agreement should have a clear scope of representation, no matter how broad or narrow that scope may be. (There is a good argument that every fee agreement is a "limited scope" representation agreement, because every scope should have reasonable limitations.) No client should want to sign up with the lawyer trying to be all things for all people. But the scope must make sense for the firm's capabilities and the client's sought objectives and ability to pay.

Clearly identify what this agreement does *not* include and if there are certain contingencies that arise in a case that will cost additional. For example, the agreement may say "This scope of representation does not include appeals. Appeal requires a new fee agreement be done between us, and additional legal fees and costs would be discussed there."

Or it could say something like "This fee does not include answering government Requests for Evidence (RFE), addressing criminal history you have not disclosed to me, or appeals. If one or more of these arise, I will answer it after notifying you and getting your consent, and I will bill you at my hourly rate of $250 per hour. Please understand that these are always a possibility, and that it can result in significant additional legal fees. If you have questions or concerns about this, please speak with me *before* you sign this agreement." You should review the agreement with them, ideally in their language, and make sure they understand clauses like this in particular.[1]

If the case has phases where certain portions of the fee is earned, make sure to correlate the amount and phase directly. If there are contingent scopes of representation—one part is contingent on success of another or will not happen if the other is successful—clarify those points or create a separate fee agreement for them.[2] If there is anything the client would reasonably mistake as included in the scope of representation (e.g. appeal) then state those as not included.

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[1] It's important to look at your applicable state's rules for fees, because there is a lot of variation here. Some states require an agreement be in the language it was negotiated, so if you spoke another language you must supply the agreement in that language as well. See California Civil Code 1632(b)(6).

[2] See Colorado Rule Change 2019 of RPC 1.5, Fees, regarding flat fees, with sample fee agreement containing phases and earned amounts: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2019/Rule%20Change%202019%20(05)(2).pdf

## 4. Clearly Describe Attorney's Fees and Distinguish from Costs

It's very common that the actual lawyer's fees clauses end up scattered throughout the fee agreement. We draft it based on a sample, suggestions from presentations, and after having issues with clients we revise sections piecemeal. The money is a big issue the agreement is designed to address. Somehow the clauses about it get peppered throughout the document. The result is confusion for the client.

First, get all your money clauses in one section. Put attorney's fees first and costs second (we'll deal with costs later). Now, ask yourself what kind of fees you are charging? Contingent, hourly, fixed/flat, or some hybrid fee (a combination of these). There's also the advance fee deposit (money paid in advance for work that will be completed) and a true retainer (money paid purely for the lawyer to be available to the client). The attorney's fees clause varies widely based upon the fee structure used.

We look at the rules and they do help. Model Rule 1.5, Fees, says an attorney's fee must be reasonable. "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." MR 1.5(b). Communicating this detail in writing is preferred, many jurisdictions require a writing for flat/fixed fees, and it is a best practice to use a writing in every representation except those with long time clients and repeat, identical work.

An hourly clause may look something like this:

"My legal services for the above defined Scope of Representation, as initially discussed in our first meeting (date above), will be billed at my hourly rate of $150.00 per hour for research, document review, and preparation of application filings and communications. An advance fee deposit of $3,000.00 is due upon signing of this agreement.

These funds will be placed in my lawyer trust account until they are earned – that is, paid to me bi-weekly, on an hourly basis, as I perform the services set out in the Scope of Representation. If the advance fee deposit is exhausted, I will bill you for additional services as the case progresses. I will keep a record of my hours and services rendered which will be made available to you for review at the end of our attorney-client relationship, or upon your request."

This is an example of what some call and "evergreen retainer agreement" looks like, but note that a true "retainer" is a legal fee paid for mere lawyer availability, and an additional fee would be charged for any work the lawyer performed.[3] These are common in municipality

[3] For example see California RPC 1.5(d): "A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as

representation agreements, for example. Most immigration lawyers work on a flat/fixed fee bases, or an hourly rate basis, and are not engaged under a retainer.

For a flat/fixed fee agreement, the clause may look something like:

"The scope of representation above will be completed at the flat fee of $4,000. One fourth of that fee ($1,000) is due upon signing this agreement and an additional fourth is due at each following phase. I place my flat fees in my operating account and it is considered earned upon receipt, because this is permitted by state law.

But you could still be entitled to a refund if the work in the scope of representation is not completed before termination of our relationship. If one of us seeks to end the relationship before the scope is finished, payment will be due up to the last phase of the work completed, and all or part of the rest of the funds will be refunded within three days of receiving or giving notice of termination."

Being very clear about where the money is and what it is for is key when drafting fee clauses. There are three elements every flat fee agreement should have: 1) how much, 2) for what value or step, and 3) when that amount is earned. The amount earned at each juncture should have a reasonable relationship to the value conferred to the client. In other words, don't have a $5,000 flat fee for an Adjustment of Status with $4,000 being earned by merely opening the file. It can be approximate, but match the earning point with the work completed at that point more accurately.

There is sometimes cause to have few, simple to understand phases and earned amounts. Consider the administrative costs to having many phases and earning points, and what needs to be done with the trust account and operating account at each point. An agreement may read something like:

"The phases of the case and what portion of the flat fee is earned at each phase are as follows:

1. Preparing and filing – one half.
2. Interview – one quarter.
3. Notice of result – one quarter."

A contingent fee agreement clause may read "Work on your case entitles me to legal fees, whether I am your lawyer at the conclusion or not. Legal fees for my services will come from any settlement or verdict resulting from this case, at the rate of 40%, to be calculated before costs are determined and deducted. If we part before your cases is

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compensation for legal services performed or to be performed." See also Colorado's definition of "engagement retainer" at RPC 1.5, Comment 16 here: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2019/Rule%20Change%202019%20(05)(2).pdf

concluded, I will be entitled to a lien against any future settlement or verdict on this case, for the amount of work I did, to be proven by time records."[4]

## 5. Have a Costs/Expenses Clause that Helps Clients Budget For It

A costs clause should explain that costs in the case are separate from attorney's fees and give examples of what common costs are charged in cases like theirs. The clause may say something like: "I will deduct from the advance fee deposit for out-of-pocket costs incurred on your behalf such as filing fees, records or document retrieval fees, messenger or delivery services, copy and mailing services, travel expenses, or other costs necessitated by the Scope of Representation and beyond those ordinarily assumed by my firm. Typical costs for a case like yours are [follow this schedule or attach a schedule of common fees or fee ranges].

Or the costs clause may say something like, "The attorney's fees above do not include the costs that come from your case. These costs must be paid by you. When the filing fee is due I will contact you to ask for a check in $XXX amount, made payable to the government. That check will be mailed with your petition/application. Other costs may include records or document retrieval fees, messenger or delivery services, copy and mailing services, travel expenses, or other costs necessitated by the Scope of Representation. You will be invoiced for these costs quarterly. Typical amounts for costs are [follow this schedule or attach a schedule of common fees or fee ranges]."

Costs such as expert witnesses or private investigators, reports such as psychological evaluations or property boundary assessments or inspections, medical biometrics or diagnostics, or translation and interpretation services can become very expensive. Some firms fund client cases until a later date, and others expect these funds to be paid in advance or directly to the provider. Whatever your firm decides, make sure the client isn't blindsided by these additional costs. They will blame you, even though the money doesn't go to you. Prepare them for the entire experience they are about to have, not just your corner, to build trust and a meeting of the minds.

Don't list a slew of costs the firm never actually charges for just to reserve the right to charge for them if you decide to in the future. Have a policy for what costs the firm actually charges for and list just those.

[4] Lawyers don't like to track time. It's cumbersome, an administrative burden. But it comes in really handy if the scope or representation is not completed, or if you need to prove your work to a client or judge, such as an in quantum meruit claim or judgement for lawyer's fees—not to mention that your business needs the data. That said, your fees and costs clauses should reflect your processes and policies, and you should aim to minimize administrative burden of billing, invoicing, and collecting, just as you should be seeking efficiencies in all your work.

In addition, if there are collection processes for unpaid fees and costs, have a separate clause explain what those processes are. This language should be appropriate, but not scary. The agreement is to attract clients as much as it is to solidify the relationship.

## 6. Define Lawyer's Duties to Client and Client's Duties to Lawyer

Too often, lawyer fee agreements are stern about the money and the client's obligations to you, without expounding on your obligations to the client in this relationship or telling them what really constitutes legal services. There are so many reasons to do this:

1. It's fair to go over both side's duties
2. You want your expectations to be explicit
3. You can refer back to it when reminding them of their work that needs to be done
4. You can refer back to it if they fail and you want to focus them or withdraw
5. Your duties to them shows them your craft, your value, and what you bring to the table
6. The pair of duties sets a tone for the relationship
7. And educates them more about what the process will entail

The disclosure of a lawyer's duties could be something like:

> "By signing this letter, you confirm your understanding that I am agreeing to represent you alone, and that we are entering into an attorney-client relationship. I am professionally committed and ethically obligated to protect your interests and it is you, and only you that I represent. I have duties of loyalty, communication, and diligence to you, as well as a fiduciary duty and obligation to you. This means I will keep you apprised of the status of your case, respond to your requests for information or your questions within a reasonable time, maintain your privacy, and inform you of your rights and the legal implications of your actions. Please understand this does *not* mean I will be required to work for free on your case, or that I will lie or be required to further fraud on your behalf."

The description of the client's duties may be something like:

"This process will require your reasonable availability to meet and confer by phone or videoconference, as needed, should issues or questions arise. Your duties to me include:

- Honesty
- Following my instructions to keep you in compliance
- Informing me of changed circumstances and contact information
- Send me any letters, emails, or other communication you receive from the government regarding your application or immigration status
- Responding to my requests for information or questions promptly
- Making yourself available tor meetings, interviews, etc.
- Paying the invoice from our firm on time

You should then set forth the consequences if the client does not comply: “Failure to do these things will result in…” or “If you do not follow these rules, I may…”

## 7. Help a Client Be the Best Client They Can Be

Truth is one of the bedrocks of our profession. When a client is untruthful it puts your professional reputation on the line. Therefore, it makes sense to have a “don’t lie” clause. You can be explicit in saying that you only represent people who tell the truth, because you can’t represent someone effectively if they have lied to you. You may insist that a client lying is grounds for withdrawal.

“My professional reputation in courts that I appear regularly is of great importance to me. I have a duty of candor to all tribunals, which means I must tell courts the truth. It is also very difficult to prepare for a case when I don’t know all the facts—even the bad facts. For these reasons you must tell me the truth. For me to effectively prepare your case and advocate for your best interests I must know all the details. If I discover you misled me after we have entered into this agreement, it will be grounds for my immediate withdrawal.”

Or it may say something like “It is impossible to predict the outcome of a naturalization petition at this point in the process. The best I can do is lay out the law for you and zealously represent your interests, ethically and professionally. To this end, it is paramount that you be forthright and communicative from the onset of the attorney-client relationship. The quality and effectiveness of my work depends upon my familiarity with you, your background, challenges, experiences, past events that gave rise to this choice, hopes for the future, friends and family, significant others, and more. Please recognize that this is not a contingent fee agreement, meaning that if my legal representation is unsuccessful in some fashion, I am still entitled to payment for my services.”

You can make a distinction between intentional falsehoods and mistakes here if you feel like this is harsh. This will scare away people hiding things or bring out the lie earlier on so you can deal with it effectively and hopefully not be blindsided.

## 8. If You Have Two Clients, Address the Elephant In the Room

Joint/dual representation always opens the door to possible conflicts of interest, whether it is husband and wife, child and parent, employer and employee, business and officer, or some other joint representation, you must explain that risk in the first meeting and in the agreement. A conflict doesn’t arise in most cases, but when it does you will be so grateful you set down a plan for how to proceed in the agreement, when it does. Here is a path to addressing potential conflicts of interest with joint/dual clients:

### Explain Conflict of Interests Potential in Joint Representation

The risks of going forward with a potential conflict start with explaining there is a potential for conflict. A lawyer may represent parties that have a conflict if she reasonably believes she can

provide competent, diligent representation to both, it's not prohibited or directly adverse, and "each affected client gives informed consent, confirmed in writing." Model Rule 1.7(b). "'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." MR 1.0(e).

Therefore, to do adequate informed consent, the conflict must be foreseeable and the risks of proceeding with the joint representation should be explained. A joint representation agreement may say something like "Every time there is joint or dual representation there is a potential for conflicts of interest. I have evaluated your present circumstances for common conflicts and have not identified any, therefore I believe I can represent you two equally zealously and aim to achieve your mutual objective. However, if a conflict arises….

### Give Examples of Typical Conflicts

To show foreseeability and help educate the client about what types of conflicts could occur, set some out. "In a case like yours, a common conflict of interest is [3 examples for a case like theirs]."

State what will happen if a conflict arises: "If I determine a conflict has arisen that cannot be managed between the two of you, we will either adjust course towards other forms of relief or that I withdraw from representation."

Or "In rare circumstances employment needs drastically change or one or both parties find the employer-employee relationship not a good fit. In such an instance I will withdraw from representation of the employee whom I have a limited scope of representation that only includes the aforementioned immigration relief processes. I will remain counsel to the employer whom I have a longstanding relationship and a wider scope of representation with, unless circumstances warrant a withdrawal from both parties. If the employee needs a referral for legal advice, I will direct him to several resources." [5]

Only a foreseeable conflict can be properly consented to by a client, so this is a very important part. If the conflict that arises is not enumerated in the examples, it would probably warrant an additional informed consent conversation and writing.

### Set Ground Rules in the Joint Representation

Set the ground rules of engagement from the beginning. These rules should match what your firm believes is in the best interests of the client and the firm.

For example, if you don't want one client telling you a secret you then must keep from the other (confidentiality rights still adhere under MR 1.6), tell them there will be no secrets between us. "I will share information material to representation with the other client in this

[5] While many state's ethics rules state imply withdrawal from both clients upon conflict is required, it is this author's assertion that if the agreement prepares them clearly for another outcome it should hold up so long as it is fair and reasonable.

relationship. We agree, by signing this, that we prefer to have an open and transparent working relationship in order to alleviate inefficiency and confront issues proactively. If a party refuses to disclose pertinent information, it will be grounds for the lawyer to withdraw, and she will be permitted to disclose enough information to withdraw from representation and explain her withdrawal sufficiently."[6]

## 9. Don't Treat a Third-Party Payor Like a Client

Certain clients may have a third-party payor—a relative or interested party who wants to help the client by paying for their case. Distinguish this from joint representation. Here, the payor is not represented at all. There is a potential for conflict with the third-party payor who often has a sense of entitlement to information or a vested interest in outcomes, because they paid for it. But they has no right to that information. Therefore, help the third-party payor understand what rights they do and don't have with their payment.

### Define Who Is the Client

Be explicit about who the client is and is not, and what that means. Your agreement with the third-party payor could say:

"A client is the party who decides the objectives of the case. I advise only the client on the law and strategies for achieving the client's objectives—but generally the client has the final say how we will proceed. You are solely a payor which does not entitle you to the rights of a clients."

Or,

"You have paid me $3000 to seek the below scope of representation for your daughter and three grandchildren. However, you are not the client—they are my clients. Because you are not the client, I do not have a duty to communicate case status updates to you or explain about the process in this particular case with you, beyond explaining the usual process, costs, and when payments are due. This can be frustrating to a payor when things start happening...."

A similar clause should be in the clients-lawyer fee/engagement agreement, explaining who the payor is, and who the client is, in this case.

### Explain Confidentiality and Set Boundaries with a Third-Party Payor

Third-party payors often believe they are entitled to information about the case because they paid the fee. However, ABA Model Rule 1.6[7] says:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in

[6] See DC Bar Ethics Opinion 296: Join Representation: Confidentiality of Information at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion296.cfm

[7] We use the ABA Model Rules because they are the basis of all state rules. However, state rules vary from the Model Rules often, and sometimes dramatically. Please compare your state's version of the rules cited herein.

> order to carry out the representation or the disclosure is permitted by paragraph….A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Further, Comment 4 to ABA Model Rule 1.6 prohibits the "disclosures by a lawyer that do not in themselves reveal protected information[,] but could reasonably lead to the discovery of such information by a third person."

Therefore, you may not share confidential or protected information with third-party payors unless the client has given informed consent after all the risks have been explained to her.

For example, maybe you say something like "Client confidentiality is foundational to the practice of law. I will not share the client's confidences to me unless she explicitly directs me to tell you certain things, and even in this circumstance I will limit what I tell you to only essential information."

Or, if you and the client prefer to communicate more openly with (or through) the payor, put a limited confidentiality waiver in the agreement. "Client confidentiality is …Marta has expressed that she wants me to keep you informed of the status of her case. This is a limited waiver of confidentiality that only extends to you. I have discussed that it can jeopardize attorney client privilege and other risks that can arise. She can revoke this waiver at any time, and if she does I will only be able to tell you what she has revoked it—not why or anything else about the case."

*Informed consent* is defined in Model Rule 1.0, Terminology, as "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." Most jurisdictions require consent in writing and is often called a "conflicts waiver." Conflicts waivers need to set out all the potential risks of the course of action, so there should be a discussion of what potential problems could arise in giving the third-party payor information about the case could cause (e.g. conflict about client decisions, obviate attorney-client privilege, etc.)

### Set Out Who Gets a Refund

If a client terminates representation that has been paid for by a third party, be explicit in the agreement as to who gets the money if a refund is owed. Model Rule 1.15(e) says "When in the course of representation a lawyer is in possession of property in which two or more persons…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…*not* in dispute" (*emphasis added*).

In order to avoid disputes about where a refund would go, make it explicit in the agreement (this is one of the reasons I think there should be two agreements with third party payors—one with client and one with payor). If you think it should be returned to the payor, state that in the

agreement. If you think it is better to return it to the client, state that in the agreement. So long as everyone is on notice, it resolves the fee dispute before it happens.

Finally, with third-party payors, it may make sense to have two agreements—one with the client and one with the third-party payor. There are really two different contractual relationships that both deserve some framing and structure.

## 10. Reduce Your Risk Exposure with a Choice of Laws Clause

This is mostly for multijurisdictional practices where multiple sets of ethics rules could apply. Make it explicit so you have the best chance of controlling what rules you are working under and the client is on notice.

ABA Model Rule 8.5, choice of laws, says, "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." So, think through where it is most reasonable the effect will predominantly lie and learn those rules, whether they are the ones you chose for your agreement or not.

## Conclusion

Fee agreements are living documents that should be improved regularly. An agreement often sounds stale and clunky when it's even just a year old. Experiences with clients should inform your ideas for improvements and changes to the agreement. If a common misconception comes up, clarify it in the agreement.

Making some or all of these changes may lengthen the agreement. Some lawyers abhor the idea of giving a client and agreement over three pages while others are comfortable with an eight-page engagement agreement. Language and translation barriers come into play, too. Use your best judgement and apply an overarching goal of transparency and clarity. If a new system or workflow is put into place, look at the fee agreement to see if anything should be changed to reflect the change (especially if the new process is outward facing).

When editing, look at it through a client's lens. Be brief and use plain language. Aim for a friendly, positive, intelligent tone at an eighth-grade level or lower (depending on client base).[8] It is a memorialization of the relationship the firm has with clients, so it should reflect the values and vision of the firm as much as the good work that follows. Working on the fee agreement periodically will improve client-lawyer relationships, as well as protect the firm.

[8] To test readability age see https://www.online-utility.org/english/readability_test_and_improve.jsp