
Wisconsin Ethics Opinion E-09-03: Communications Concerning Attorneys' Fees and Expenses

Revised April 17, 2020

Synopsis:

In every representation, a lawyer must inform the client of the scope of the representation, the basis or rate of the lawyer's fee and any expenses for which the client will be responsible. This communication should be sufficient to enable the client to readily determine the matter, or nature of an on-going lawyer-client relationship, the method by which the lawyer's fee will be calculated and the types of costs and expenses for which the client will be responsible. This communication must be in writing whenever it is reasonably foreseeable that the total cost to the client will exceed \$1000 and agreements to limit the scope of the representation must usually be in writing. Contingent fee agreements, however, must always be in writing and signed by the client. The initial communication with the client should also inform the client if the lawyer intends to charge a reasonable rate of interest on delinquent balances and whether the lawyer anticipates that the lawyer's rates may increase during the course of the representation. This opinion supersedes E-91-2, which is hereby withdrawn.

OPINION

The initial correspondence sent to a client after consultation about representation is an important communication about the lawyer and the lawyer's services. In addition to fulfilling the lawyer's obligations under the Rules of Professional Conduct (the "Rules"), the communication can be used to establish a successful working relationship between the lawyer and the client. Accordingly, careful consideration should be given to the content of the initial communication.

This opinion discusses the parts SCR 20:1.5 which set forth a lawyer's obligations in communicating with a client concerning fees and expenses.¹ The Rule sets forth the information that must be communicated to a client with respect to a lawyer's fees and describes the circumstances in which information may be conveyed orally or must be conveyed in writing or in

¹ The provisions of SCR 20:1.5 that govern how a lawyer handles fee payments, such as SCR 20:1.5(f), which requires lawyers to place advanced fees in trust, and SCR 20:1.5(g), which permits a lawyer to place advanced fees in an operating account if the lawyer complies with the alternative protection provisions, are beyond the scope of this opinion.

a writing signed by the client. Other rules, such as SCR 20:1.0 and SCR 20:1.2, which contain important definitions, are relevant and will be discussed herein.

I. Information that Must be Communicated to the Client.

SCR 20:1.5(b)(1) requires that: (1) the scope of the representation; (2) the basis or rate of the fee; and (3) the expenses for which the client will be responsible be communicated to the client before or within a reasonable time after commencing the representation. The only exception to this requirement **in SCR 20:1.5** is when the lawyer will charge a regularly represented client on the same basis or rate as in the past. Each of the required elements of the communication the lawyer must convey to the client merits further discussion.

A. Scope of the Representation.

The communication to the client concerning the scope of the representation should be a clear description of the services and matter for which the lawyer has been retained. The Rule does not explicitly require a particular degree of specificity. The Committee believes, however, that the Rule requires a lawyer to provide enough detail to enable the client to identify the particular matter involved. In many cases, the description of the scope of a representation may fulfill this requirement while being brief. Accordingly, a description such as, "Legal representation in connection with contract dispute with party X concerning delivery of widgets" or, "Legal representation in connection with automobile accident in X county on or about date Y" should be sufficient for straight forward matters. An estate planning matter could be described as, "Preparation of Will" or more generally as, "Preparation of estate plan."

Such a brief description, however, may not be possible when a lawyer's relationship with a client is not limited to a single discrete matter. If there is not a particular matter or case which can be easily identified, the lawyer should focus on providing as clear a description of the lawyer-client relationship as possible. Again, this description may be fairly brief and meet the requirements of the Rule. So, for example, if the lawyer is retained to handle general representation of a business client, the description could state, for example, "Business-related matters as may arise from time to time and as requested by you." Or a description of may consist of "Legal advice and services in connection with business matters as requested by you."

While the Committee believes that fairly brief descriptions may usually suffice to fulfill a lawyer's obligations under SCR 20:1.5(b)(1), lawyers may wish to provide greater detail, particularly with respect to services not within the scope of the representation. Engagement letters are contracts with clients, and ambiguities will be construed against the lawyer/drafter, and thus lawyers should carefully consider whether the language reflects the actual intent of the parties. If, for example, a lawyer intends to provide general transactional, but not litigation, services to a business client, or a lawyer may wish to agree to represent a client on a criminal charge at trial, but not on any possible appeal, such exclusions should be included in the description of the engagement. Care should also be taken to avoid descriptions that might imply

a future obligation to monitor the client's estate plan, for example, "General Estate Planning", unless that is what is intended.

SCR 20:1.2(c) permits a lawyer to limit the scope of representation if the limitation is "reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in SCR 20:1.2(c)(1)."² When undertaking a limited scope representation, it is particularly important for the lawyer to clearly communicate to the client the limits of the representation. In most circumstances, in a limited scope representation it will be necessary for the lawyer to inform the client what services the lawyer will not provide to the client. This is because the representation is often limited in a manner that varies from what a client might typically expect, and this information must be communicated to the client. For example, "legal representation through negotiation and sentencing (but not including trial) in connection with pending OWI charge." Even when an oral communication concerning fees and costs is permitted, a lawyer should be careful to observe the requirements of SCR 20:1.2(c) that client informed consent to limited scope representation be in writing in most circumstances.

B. The Basis or Rate of the Fee.

SCR 20:1.5 provides no explanation as to the detail that must be included in a description of the basis or rate of the lawyer's fee. The Committee believes that the Rule requires the information to be sufficient to enable the client to understand how the fee will be calculated, and that it should be communicated in a clear and easily-understood manner. The basis or rate of the fee might be a specified hourly charge, a flat fee, a percentage of the amount recovered or a description of a set of factors on which the fee will be based. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

In setting the basis or rate of the fee, a lawyer must comply with SCR 20:1.5(a), which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses. SCR 20:1.5(a) provides that the factors to be considered in determining the reasonableness of the 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 exceptions to the requirement that the clients informed consent be in writing are set forth in SCR 20:1.2(c)(1) as follows: "The client's informed consent need not be given in writing if: a. the representation of the client consists solely of telephone consultation; b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order; d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

- (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 the 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.”³

The ABA Comments⁴ caution that, “[a] lawyer should not exploit the fee arrangement based primarily on hourly charges by using wasteful procedures.” SCR 20:1.5, ABA Comment [5]. Fees that the Wisconsin Supreme Court has ruled to be unreasonable include fees that exceed a statutorily permitted fee (*In re Estate of Konopka*, 175 Wis. 2d 100, 498 N.W.2d 853 (Ct. App. 1993)), fees that were inflated to make up for fees lost when the client successfully challenged a previous billing (*In re Glesner*, 2000 WI 18, 233 Wis. 2d 35, 606 N.W.2d 173), and fees charged for retrieving the clients’ file to answer inquiries when they filed a grievance against the lawyer (*In re Kitchen*, 2004 WI 83, 273 Wis. 2d 279, 682 N.W.2d 780).

1. Anticipated changes in the basis or rate of the fee.

The Wisconsin Committee Comment accompanying SCR 20:1.5 states that “[a] lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.” Not disclosing, for example, that hourly rates may be adjusted annually may run afoul of SCR 20:1.5(b)(1)’s requirement that the client be informed of the basis of the rate or fee.

As discussed below, changes in the basis or rate of the fee also must be communicated to the client when they actually occur (see Section VI.A, *infra*).

2. Interest charges.

The rules do not prohibit a lawyer from charging a reasonable rate of interest on outstanding balances for fees or costs. If the lawyer intends to charge interest on unpaid balances, that information must be part of the written communication to the client regarding fees or must be clearly communicated to the client at the beginning of the representation if a written communication is not required. A lawyer who imposes interest charges absent prior notification to the client runs the risk of being found to have violated SCR 20:1.5(b)(1), concerning

³ If the representation contemplates a division of a fee between lawyers who are not in the same firm, SCR 20:1.5(e) comes into play. The requirements of that section are beyond the scope of this Opinion.

⁴ SCR 20:1.5 has both a Wisconsin Committee Comment and an ABA Comment,

communication as to the basis or rate of the fee, and to have charged an unreasonable fee in violation of SCR 20:1.5(a).⁵ See Wisconsin Ethics Op. E-90-4.

C. Expenses for which the Client will be Responsible.

If the client will be charged for photocopying costs, court reporter fees, filing fees and the like, the communication at the outset of the representation must inform the client of that fact. The rule does not require that the specific amount of the costs that will be charged to the client (i.e., X¢/page for photocopying) be identified in advance, but that information should be provided if known.⁶

SCR 20:1.5(a) prohibits a lawyer from charging or collecting an unreasonable amount for expenses. The ABA Comment accompanying SCR 20:1.5 states that a lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges. According to the comment, this may be done “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.” SCR 20:1.5, ABA Comment [1]. Marking up expenses, such as fees for photocopying, with the intention to use such expenses as a source of profit for the lawyer, is not permitted. See ABA Formal Ethics Op. 93-379 (1993).

II. Requirement of a Written Communication.

Whether the information the lawyer must provide the client regarding the scope of the representation, fees and expenses may be communicated orally or whether it must be communicated in writing depends on the amount of the fee and expenses that are involved and whether or not the fee is contingent on the outcome of the matter.⁷

⁵ It is also unlikely that the lawyer would be able to collect interest charges unless such charges were part of the original engagement agreement. See *Ziolkowski v. Great Lakes Dart Manufacturing, Inc.*, 2011 WI App. 11, 794 N.W.2d 253.

⁶ The absence of a requirement that the specific amount for various expenses be disclosed in advance reflects the fact that many types of expenses, such as expert witness fees, cannot be known in advance.

⁷ Lawyers must also remain aware of the requirement for written confirmation of agreements to limit the scope of representation pursuant to SCR 20:1.2(c).

A. Representation not Involving a Contingent Fee.

1. Matters for which it is reasonably foreseeable that the total cost of the representation will be greater than \$1,000.

A written communication to the client *is* required if it is “reasonably foreseeable” that the total cost of representation to the client, including attorney’s fees, will be more than \$1,000. SCR 20:1.5(b)(1).⁸

2. Matters for which it is reasonably foreseeable that the total cost of the representation to the client will be \$1,000 or less.

If it is reasonably foreseeable that the total cost of the representation will be \$1,000 or less, the communication to the client regarding the scope of the representation, fees and expenses need not be in writing. Thus, a lawyer who intends to charge \$500 for a simple matter still must inform the client of the scope of the representation, the basis or rate of the fee, and any expenses for which the client will be responsible, but may do so orally. A written communication conveying the same information would, of course, also comply with the Rule.⁹

What if the total cost of the representation was anticipated to be \$1,000 or less at the outset of the representation, but then exceeds \$1,000 during the course of representation? SCR 20:1.5 does not explicitly address that scenario. The Rule’s reference to what is “reasonably foreseeable,” arguably implies that the appropriate reference point is the commencement of the representation. On the other hand, once the cost exceeds \$1,000, it is certainly foreseeable that the total cost will be even higher than that by the time the representation is concluded. Further, the clear intent of the Rule is to encourage, and in most cases require, lawyers to provide information with respect to fees and costs to clients in writing. Accordingly, in the opinion of the Committee, compliance with the Rule would require a written communication concerning fees and expenses at such time that the lawyer anticipates the total cost to exceed \$1,000, regardless of whether this occurred at the commencement of the representation or while the representation is in progress.

⁸ The term “total cost” refers to fees charged by the lawyer or firm, costs billed by the lawyer or firm to the client and costs for which the client will be directly responsible.

⁹ As the ABA Comment points out: “A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.” SCR 20:1.5, ABA Comment [2].

B. Representation Involving a Contingent Fee.

Pursuant to SCR 20:1.5(c), a contingent fee agreement must be in a writing signed by the client and must state:

- (1) “[T]he 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;”
- (2) “litigation and other expenses to be deducted from the recovery;” and
- (3) “whether such expenses are to be deducted before or after the contingent fee is calculated.”
- (4) The agreement also “must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.” SCR 20:1.5(c).

In accordance with SCR 20:1.5(b)(1), the contingent fee agreement must also explain the scope of the representation. This is particularly important if the lawyer’s representation is limited, for example, to handling the matter through settlement or trial, but not on appeal.

When the contingent fee matter is concluded, SCR 20:1.5(c) requires the lawyer to provide the client with a written statement:

- (1) “[S]tating the outcome of the matter;” and
- (2) “if there is a recovery, showing the remittance to the client and the method of its determination.”

Note that SCR 20:1.5(d) prohibits a lawyer from entering into a contingent fee agreement in certain types of actions affecting the family or when representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

III. Communication with Regularly Represented Clients.

SCR 20:1.5(b)(1) does not require a communication with the client about the scope of the representation or the basis or rate of the fee and the expenses for which the client is responsible if the lawyer will be charging “a regularly represented client on the same basis or rate as in the past.” Neither the rule nor the comments define “regularly represented client.” The ABA Comment, however, states that “[w]hen 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.” SCR 20:1.5, ABA Comment [2]. This suggests that sporadic or infrequent representation that is unlikely to have produced such an understanding will not constitute “regular representation.” It further suggests that the question does not necessarily turn on the number of matters or contacts within a certain time period, but rather on the nature of the relationship between the lawyer and the client.

The question the lawyer should consider is whether it is reasonable for the lawyer to conclude that the client understands that the client will be billed on the same basis as in the past. The answer to this question depends on the context. Clients with differing levels of sophistication in dealing with lawyers, for example, may have differing conclusions regarding the concept of “regular” representation. The lawyer should be sensitive to this when deciding whether the basis or rate of the fee should be communicated to the client when additional representation is undertaken.

IV. Timing of the Communication.

SCR 20:1.5(b)(1) requires that the communication concerning the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible be communicated to the client “before or within a reasonable time after commencing the representation.” A lawyer accordingly may start working for the client and may provide the client with the written communication concerning fees within a reasonable time thereafter. What constitutes a “reasonable time” after the representation has begun will depend on the circumstance. SCR 20:1.5 contemplates, however, that the client be advised of important information concerning the representation before the matter proceeds very far and therefore should be done as soon as reasonably practical. In this way, the client will not be inconvenienced unnecessarily if the client decides to hire a different lawyer after considering the information. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

V. What Constitutes a Writing?

When information concerning fees and expenses must be communicated “in writing,” how may this be accomplished? SCR 20:1.0(q) defines a “writing” as “a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and email.” Thus, a writing required by SCR 20:1.5 need not be in the form of a “fee agreement” (indeed, the rule does not use that term), but could be something as simple as an email, a letter or memorandum, or as suggested by the ABA Comment, “a copy of the lawyer’s customary fee arrangements.” SCR 20:1.5, ABA Comment [2]. Arguably, a voicemail message falls within the definition of a “writing,” although using a voicemail message as a “writing” undercuts the benefits of documentation and retention contemplated by the rule.

VI. Other Information that Must be Communicated in Writing.

A. Changes in the Basis or Rate of the Fee.

Regardless of whether the initial communication concerning fees was required to be in writing, SCR 20:1.5(b)(1) requires that any changes in the basis or rate of the fee or expenses be communicated to the client in writing. There are no exceptions to this requirement. Thus, even in the case of a regularly represented client as to whom no communication regarding fees and expenses was required upon the commencement of additional representation, information

concerning a change in the basis or rate of the fee (for example, an increase in hourly rates) must be communicated to the client in writing. The Wisconsin Committee Comment to SCR 20:1.5 explains this requirement as it relates to a regularly represented client:

In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that the change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses.

The Wisconsin Committee Comment thus makes it clear that a change in rates does not necessarily require a separate written notification to the client, but it does require at least a clear statement on a bill sent to the client notifying the client of the change and indicating the new basis or rate of the fee or expenses.

B. Purpose and Effect of any Retainer or Advance Fee.

SCR 20:1.5(b)(2) states that if the total cost of representation to the client, including attorney's fees, is more than \$1,000, the "purpose and effect" of any retainer or advance fee that is paid to the lawyer shall be communicated to the client in writing. According to the Wisconsin Committee Comment accompanying SCR 20:1.5, "the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer." A "retainer" is defined in SCR 20:1.0(mm) as:

[A]n amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of the client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

"Advanced fee" is defined in SCR 20:1.0(ag) as:

[A]n amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or other basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an

advanced fee regardless of whether that fee is characterized as an “advanced fee,” “minimum fee,” “nonrefundable fee,” or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h, SCR 20:1.15(g), and SCR 20:1.16(d).

VII. When Must the Writing be Signed by the Client?

SCR 20:1.5 does not require the client’s signature on a writing which communicates the information required by SCR 20:1.5(b)(1) (the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible). Contingent fee agreements, however, must be signed by the client. A writing signed by the client is also required in certain situations involving a division of fees between lawyers who are not in the same firm. See SCR 20:1.5(e). Pursuant to SCR 20:1.0(q), 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.”

VIII. Responding to a Client’s Request for Information Concerning Fees and Expenses.

SCR 20:1.5(b)(3) states that “[a] lawyer shall promptly respond to a client’s request for information concerning fees and expenses.”

In summary, a good working relationship with a client requires proper communication concerning the fees and expenses for which the client will be responsible. SCR 20:1.5 is designed to ensure that this communication occurs.

Wisconsin Formal Ethics Opinion E-91-2 is hereby withdrawn.