NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1087 (3/23/2016)

Topic: Charge for cancelling meeting with lawyer

Digest: A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge.

Rules: 1.5(a) & (d)

FACTS

1. A law firm wishes to discourage the cancellation of initial consultation appointments (usually by potential divorce or Family Court clients), without reasonable advance notice, and the resulting reduction of its ability to schedule appointments for and meet with other clients and prospective clients. The firm, which charges $150 for initial consultation appointments, proposes to take a credit card account number upon scheduling the appointment, and to explain that it will charge $25 if the potential client cancels the appointment without reasonable notice.

QUESTION

2. May a law firm ethically charge $25 if a potential client cancels an initial appointment without reasonable advance notice?

3. If it is permissible, must the law firm communicate the policy to the potential client in writing?

OPINION

4. Under the facts here, a lawyer-client relationship has not yet been formed. Thus it may not be obvious that the rules respecting a lawyer's fees and expenses, as provided in Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") are applicable to the relationship between the lawyer and the potential client. However, Rule 1.5(a) does not reference a "client;" it simply says: "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense."

What Constitutes an Excessive Fee or Expense

5. The question here is whether the proposed $25 charge to a person who cancels an initial appointment without reasonable advance notice is "excessive." That question is highly fact specific. For a fee, relevant considerations include review of the factors enumerated in Rule 1.5(a)(1) – (8), among others. *See* Rule 1.5, Cmt. [1] (the factors specified in paragraphs (a)(1) though (a)(8) are not exclusive.) For an expense, the lawyer is authorized to charge the client only the actual cost incurred, plus administrative expenses, unless the client consents and the amount is not excessive. *See* Rule 1.5, Cmt. [1] ("lawyer may seek payment for services performed in-house . . . either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive"); N.Y. State 1050 (2015) (*citing* Rule 1.5, Cmt. [1] and other bar association opinions); N.Y. City 2006-3 (regarding expenses, lawyers may charge only the direct cost and a reasonable allocation of overhead expense); ABA 93-379 (1993) (same).

6. A person's cancellation of an initial consultation without adequate notice may cause the lawyer to forego other opportunities for gainful employment, as well as creating administrative expense. If the cancellation charge is deemed a fee, the factors for determining whether it is excessive include "the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer." Rule 1.5(a)(2). We think it is apparent to any person that cancelling an appointment without reasonable advance notice may deprive the lawyer of the ability to fill the time slot.

7. If the cancellation charge is deemed an expense, as noted above, the amount must either reflect the cost to the lawyer or be agreed to by the client and in either case not be excessive. In the facts posed by the inquirer, the inquirer would explain the proposed cancellation charge and request a credit card, so that the giving of the credit card number may be deemed consent to the charge.

8. Moreover, the proposed cancellation charge -- $25 – is nominal. Rule 1.5(a) provides: "A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the proposed charge is excessive." We have no such definite and firm conviction. On the contrary, the proposed cancellation charge is less than 17% of the lawyer's usual $150 charge for a consultation.

Must the Cancellation Charge be Communicated in Writing?

9. The fact that some of the potential clients that are the subject of this inquiry have divorce matters may have special significance to whether the communication is oral or in writing. Rule 1.5(d) provides that a lawyer may not enter into an arrangement for, charge or collect a fee in a domestic relations matter if "a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement." Thus, if the cancellation charge is a "fee," it would seem to be prohibited by Rule

1.5(d) in a domestic relations matter before a written agreement has been signed.

10. There are also court rules that require retainer agreements in domestic relations matters (22 NYCRR 1400.3) and certain non-domestic relations matters (22 NYCRR 1215). Interpreting the court rules is a question law that is beyond the scope of our jurisdiction. We note, however, that in each case the court rule applies when an attorney "undertakes to represent a client" and, in a non-domestic relations matter, if the fee is expected to be $3,000 or greater and the services are not of the same kind that the client has previously received and paid for.

11. Comment [2] to Rule 1.5 advises that, "[e]ven where not required, 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." Nevertheless, where the matter involved is not a domestic relations matter, the Rules do not require that agreements as to fees be in writing.

12. As noted above, in the case of expenses, the amount must either reflect the cost to the lawyer or be agreed to by the client. The Rules do not require such agreement to be in writing unless law otherwise requires.

CONCLUSION

13. A lawyer may ethically charge a nominal amount to a person who cancels an appointment for an initial consultation without reasonable notice, provided the lawyer informs the person (orally or in writing) what will trigger the cancellation charge and the charge either represents the cost incurred by the lawyer as a result of the late cancellation or the client has given advance consent to the amount of the charge.

35-15