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. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement 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; the litigation and other expenses that are 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 alimony or support, or property settlement in lieu thereof; or

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

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

(1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;

(2) the total fee is reasonable; and

(3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees in advance of services shall be subject to the following rules:

(1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.

(2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to

the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

BACKGROUND

The Louisiana Supreme Court adopted this rule on January 20, 2004. It became effective on March 1, 2004, and was amended in 2006.

Paragraphs (a), (b) and (d) of this proposed rule are identical to ABA Model Rule of Prof'l Conduct 1.5 (2013). Paragraph (c) contains the words "that are" prior to "to be deducted from the recovery." This addition to the ABA language was intended by the LSBA to be purely semantic and not substantive. Paragraph (c) was amended in 2006 to require the lawyer to give the client a copy of the signed contingent fee agreement. *Advanced Quality Construction, Inc. v. Amtek of Louisiana, Inc. and Aegis Security Insurance Company,* 2016 WL-6330424 (La. Ct. App. 1st Cir. Oct. 28, 2016) (billing for secretarial tasks was unreasonable).

Fee Sharing

Paragraph (e), which addresses fee division among lawyers in different firms, varies from ABA Model Rule 1.5(e) in several respects. First, unlike the model rule, paragraph (e)(1) of this proposed rule makes no distinction between fees divided "in proportion to the services performed" and fees divided otherwise. In all cases, the client must agree in writing to the "representation" by all of the lawyers involved.

Second, under paragraph (e)(1), the client must be advised "in writing" as to the "share of the fee that each lawyer will receive." While the corresponding Model Rule has a similar requirement in Model Rule 1.5(e)(2), the LSBA proposed this language to permit lawyers to inform the client at any time, rather than only at the commencement of the representation as the ABA Model Rule suggests (but does not expressly provide). The LSBA Ethics 2000 Committee made this recommendation to the court after extensive consultation with representatives of the Louisiana Trial Lawyers' Association.

Third, paragraph (e)(3) requires each lawyer to render "meaningful legal services for the client in the matter." The LSBA proposed this departure from the model rule in an effort to curb the abuses attendant to "case brokering" by some lawyers. That is, the rule seeks to protect clients from lawyers who simply "sign up" clients, refer the cases to lawyers in exchange for a share of the fee, and then disappear until it is time to collect that share. As a result of this perceived problem, this rule requires that any lawyer who seeks to share the fee must not only "represent" the client in the matter, but also perform some "meaningful" role. Note that work potentially can be "meaningful" even if it is not time consuming or involves only client-relations activities.

Handling Client Funds and Payments

Paragraph (f), which does not appear in the ABA Model Rule, sets forth detailed guidelines addressing how a lawyer must hold and account for monies received from, or on behalf of, a client during the course of representation. These provisions provide much-needed guidance to Louisiana lawyers handling advance deposits, general retainers, fixed fees and the like. For example, paragraph (f)(5) clarifies how a lawyer must handle disputes arising over a fixed fee, a minimum fee, or a fee drawn from an advanced deposit. When a reasonable dispute arises over one of these types of fees, the lawyer must deposit the disputed portion in a trust account until the dispute is resolved.

COMMENTS TO ABA MODEL RULE 1.5

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 in-house, 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. This provision does not preclude 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 has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. 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.

ANNOTATIONS

Form of Fee Agreements

Although this rule mandates only that contingent fee agreements be set forth in writing, *see* Louisiana Rule 1.5(c), the preferred practice is to memorialize all fee arrangements with new clients in writing before, or within a reasonable time after, commencing the representation, *see* La. Rules of Prof'l Conduct r. 1.5(b) (2004). Courts construe any

ambiguity in a fee agreement against the lawyer who drafted the agreement. *See Classic Imports, Inc. v. Singleton*, 765 So. 2d 455, 459 (La. Ct. App. 4th Cir. 2000).

Arbitration Agreements

Most state courts that have considered the enforceability of lawyer-client arbitration clauses have approved them. The issue was an open question in Louisiana, however, until the Louisiana Supreme Court addressed the issue in *Hodges v. Reasonover*, 103 So. 3d 1069 (La. 2012). Noting that an arbitration clause "does not inherently limit or alter either party's substantive rights; it simply provides for an alternative venue for the resolution of disputes," the court held that a "binding arbitration clause between an attorney and client does not violate Rule of Professional Conduct 1.8(h) provided the clause does not limit the attorney's substantive liability, provides for a neutral decision maker, and is otherwise fair and reasonable to the client." *Id.* at 1076. However, the court imposed a number of "minimum" requirements for enforceable arbitration clauses:

> At a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:
>
> - Waiver of the right to a jury trial;
> - Waiver of the right to an appeal;
> - Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
> - Arbitration may involve substantial upfront costs compared to litigation;
> - Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;
> - The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;
> - The client has the opportunity to speak with independent counsel before signing the contract.

Id. at 1077. If a Louisiana lawyer includes these terms in the lawyer's engagement agreement, it will be enforceable. *See id*.

Unreasonable Fees

The factors enumerated in this rule that bear on the reasonableness of fees exist to further three important policies: (1) to ensure that clients make voluntary and informed decisions regarding fee arrangements; (2) to ensure that a lawyer collects fees that are comparable to those collected by a comparable lawyer providing comparable services; and (3) to prevent an otherwise reasonable fee agreement from becoming unreasonable due to subsequent events. *See* Restatement (Third) of the Law Governing Lawyers § 34 cmt. c (2000).

Although an unreasonable fee may lead to discipline, issues regarding the reasonableness of legal fees arise more commonly when a court[77] is called upon to award fees pursuant to law or contract, or to reduce an allegedly excessive fee. *See, e.g.*, *Silwad Two, L.L.C. v. I Zenith, Inc.*, 111 So. 3d 405, 411 (La. Ct. App. 1st Cir. 2012); *Town of Mamou v. Fontenot*, 816 So. 2d 958 (La. Ct. App. 3d Cir. 2002). Courts may inquire into the reasonableness of fees as part of their inherent authority to regulate a lawyer who practices before the court. *See In re Simpson*, 959 So. 2d 836, 841 (La. 2007); *Succession of Bankston*, 844 So. 2d 61, 64 (La. Ct. App. 1st Cir. 2003); *La. Dept. of Transp. & Dev. v. Williamson*, 597 So. 2d 439, 441-42 (La. 1992); *see also Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1978). Moreover, courts retain this authority even when a fee-award is fixed by statute or contract. *See Health Educ. & Welfare Fed. Credit Union v. Peoples State Bank*, 83 So. 3d 1055 (La. Ct. App. 3d Cir. 2011); *Rivet v. La. Dept. of Transp. & Dev.*, 680 So. 2d 1154, 1161 (La. 1996); *Warner v. Carimi Law Firm*, 678 So. 2d 561 (La. Ct. App. 5th Cir. 1996); *People's Nat'l Bank of New Iberia v. Smith*, 360 So. 2d 560 (La. Ct. App. 4th Cir. 1978). Courts, however, must temper their reasonableness review "with restraint, especially when the parties have signed a contract which memorializes the terms of their agreed-upon relationship." *See, e.g.*, *In re Interdiction of DeMarco*, 38 So. 3d 417, 427 (La. Ct. App. 1st Cir. 2010); *Gold, Weems, Bruser, Sues & Rundell v. Granger*, 947 So. 2d 835 (La. Ct. App. 3d Cir. 2006); *Drury v. Fawer*, 590 So. 2d 808, 810 (La. Ct. App. 4th Cir. 1991); *Cupp Drug Store, Inc. v. Blue Cross*, 161 So. 3d 860, 870 (La. Ct. App. 2d Cir. 2015) (judgment amended to reasonable fee amount determined by expert testimony of lawyer instead of initial "friendship rate" between plaintiff and longstanding client); *Monster Rentals, LLC v. Coonass Const. of Acadianai, LLC*, 162 So. 3d 1264, 1269-70 (La. Ct. App. 3d Cir. 2015) (because overwhelming amount of work performed by paralegals, court reduced hourly rate from $250.00 to $200.00); *Volentine v. Raeford Farms of Louisiana, LLC*, 201 So. 3d 325, 357 (La. Ct. App. 2d Cir. 2016) (finding no abuse of discretion by trial court despite contention that fee awarded was "abusively low" due to the complex and lengthy nature of the litigation).

In evaluating the reasonableness of a fee, a court may consider the testimony of a lawyer qualified as an expert on legal fees; however, such testimony is not necessarily controlling. *See, e.g.*, *Peiser v. Grand Isle, Inc.*, 224 La. 299, 231, 69 So. 2d 51, 53 (La. 1953); *James, Robinson, Felts & Starnes v. Powell*, 303 So. 2d 229, 231 (La. Ct. App. 2d Cir. 1974).

As to contingent fees, Louisiana courts have reduced large fees when a minimal amount of legal work has resulted in a large recovery. *See, e.g.*, *Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless, Inc.*, 517 So. 2d 222, 225 (La. Ct. App. 1st Cir. 1987) (remanding for an evidentiary hearing to determine whether a fee of $24,336 was an unreasonable fee for 26 hours of work performed to collect $243,354). Contingent fees can be unreasonable for a number of reasons. First, a contingent fee may be unreasonable due to a lopsided

[77] For reported decisions discussing the principles governing a federal court's review of legal fees for reasonableness, *see Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995); *A C Marine, Inc. v. Axxis Drilling, Inc.*, No. 10-0087, 2011 WL 1595438 at *2 (W.D. La Apr. 25, 2011); *Brown v. Sea Mar Mgmt., LLC*, 288 Fed. Appx. 922 (5th Cir. 2008).

allocation of risk. For example, a lawyer who undertakes a case with a high probability of a large recovery without discussing the availability of alternative fee arrangements with the client might collect a fee that is adjudged to be unreasonable. *See* Restatement (Third) of the Law Governing Lawyers § 35 cmt. c (2000). Second, a contingent fee may be unreasonable if the contingent percentage is unjustifiably large or if an otherwise reasonable percentage is applied to an unreasonable base amount, such as an uncollected judgment or a nondiscounted sum of structured-settlement payments. *Id.* cmts. d-e. However, the reasonableness of a contingent fee "cannot be determined by simply multiplying the hours worked by an hourly rate customary in the legal community." *See Town of Mamou v. Fontenot*, 816 So. 2d 958, 966 (La. Ct. App. 3d Cir. 2002). Such an "overly simplistic" formula would not properly account for the risk undertaken by the lawyer. *See id.*; *see also Saucier*, 373 So. 2d at 102.

As to hourly fees, it is unreasonable for a lawyer to bill more time to a client than the lawyer in fact spent on that client's matter. Thus, a lawyer would violate Rule 1.5 if the lawyer were to charge a client for phantom hours that were never worked. Rule 1.5 also prohibits a lawyer from double-counting hours. For example, it is unreasonable for a lawyer to bill one client for travel time while simultaneously billing another client for writing a brief on the airplane. Likewise, it is unreasonable for a lawyer to bill one client for work product previously prepared for another client. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993). To avoid this problem, lawyers should fairly apportion their time between the affected clients. For example, if a lawyer spends an hour traveling to an outlying parish to attend motion hearings for two separate clients, the lawyer should not bill each client for one hour of time. Rather, the lawyer should bill each client for one-half hour.

Changing Fee Arrangement During Representation

A 2011 ABA Formal Opinion addressed the issue of whether a lawyer may seek a midstream amendment of the lawyer-client fee agreement. According to the ABA, an amendment is not objectionable as long as it is "reasonable" under Rule 1.5(a). *See* ABA Formal Opinion 11-458 (Aug. 4, 2011) (entitled "Changing Fee Arrangements During Representation"). Modifications to existing fee agreements "are usually suspect because of the fiduciary nature of the client-lawyer relationship." *See id.* at p. 1. Citing some of the leading commentators on professional responsibility, the ABA opinion states:

> The courts are generally in accord that once the initial contract has been formed and the fiduciary relationship of client and lawyer has begun, any change in the contract will be regarded with great suspicion." Charles W. Wolfram, Modern Legal Ethics § 9.2.1, at 503 (1986) (citing cases). "Thus, an agreement that is not made roughly contemporaneously with the formation of the client-lawyer relationship will have to bear an extra burden of justification." Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 8.11 at 8-26 (3d ed. 2001).

Id. at p. 1. Finally, the opinion notes that "absent an unanticipated change in circumstances, attempts by a lawyer to change a fee arrangement to increase the lawyer's compensation are likely to be found unreasonable and unenforceable." *See id.* at p. 3A.

As to renegotiating a fixed fee, a September 2018 opinion from the Professional Ethics Committee for the Texas State Bar advised that a lawyer may renegotiate a fixed, flat fee for representing a client in litigation after the litigation is underway if the matter turns out to be greater in scope and complexity than the lawyer and client contemplated. *See* Tx. Formal Op. 679 (Sep. 2018). Such a renegotiation is permissible, however, only if is "fair under the circumstances." *See id.* at 2. The fairness of such a transaction turns on several factors including the following:

- The length of the lawyer-client relationship. The longer the relationship, the more likely the renegotiation is to be fair and reasonable.
- The extent to which the lawyer and the client "could reasonably anticipate" a change in the scope of legal work to be provided by the lawyer. That the time required may exceed what the lawyer "might have earned if the lawyer instead billed by the hour," is not a relevant consideration given that this is a risk "knowingly assumed" by the lawyer.
- The client's level of sophistication. The higher the level of client sophistication, the more likely the renegotiation is to be fair and reasonable.

Id. at 3-4. Finally, the committee noted that "the burden of proving fairness is the lawyer's. *Id.* at 4.[78]

Fee Sharing and Case Referrals

It is permissible for two lawyers who perform disparate amounts of work on a matter to share a fee. At one time, "referral fees" were strictly prohibited. *See* ABA Model Code of Prof. Resp. DR 2-107(A) (Am. Bar Ass'n 1983) (requiring that division of fees be in proportion to services rendered). However, Rule 1.5(e) permits fee sharing under carefully delineated circumstances. If the participating lawyers do not comply with this rule, then they cannot divide their fee in accordance with their agreement. *See In re Calm C's, Inc.*, 179 F. App'x 911, 913 (5th Cir. 2006) (disallowing division of contingency fee by lawyer not a party to signed contract); *Bertucci v. McIntire*, 693 So. 2d 7, 9 (La. Ct. App. 5th Cir. 1997) (dividing fee "in proportion to the services performed").

Although Rule 1.5(e) requires that the fee be in proportion to the services provided, Louisiana courts hesitate to inspect each lawyer's work in a proceeding to assess the validity of a fee division arrangement. *See Murray v. Harang*, 104 So. 3d 694, 698-99 (La.

[78] The committee further noted that a fee renegotiation is not a "business transaction" between a lawyer and a client that requires compliance with Rule 1.8(a). If applicable, that rule would require, among other things, that the lawyer advise the client in writing of the desirability of seeking and give the client a reasonable opportunity to seek the advice of independent legal counsel on the transaction.

Ct. App. 4th Cir. 2012) (noting "it is not our duty to weigh each lawyer's contribution to the handling of cases"). In *Murray*, the court upheld a 50/50 fee division when both lawyers "contributed to the totality of the work at all stages of litigation and were responsible to their clients, and were both retained throughout the course of the trial." *Id.* at 698. However, "courts have declined to apply the joint venture theory to support an equal division of the fee when the attorneys have not been jointly involved in the representation of the client." *See Robert L. Manard, III, PLC v. Falcon Law Firm, PLC*, 119 So. 3d 1, 7 (La. Ct. App. 4th Cir. 2013) (*citing Dukes v. Matheny*, 878 So. 2d 517, 520 (La. Ct. App. 1st Cir. 2004); *Brown v. Seimers*, 726 So. 2d 1018, 1022 (La. Ct. App. 5th Cir. 1999); *Matter of P & E Boat Rentals, Inc.*, 928 F.2d 662, 665 (5th Cir. 1991)). When lawyers have not been "jointly involved" in a representation, apportionment of the fee is "based on quantum meruit." *Id.* Under a quantum meruit theory, a lawyer "may receive payment only for the services he performed and the responsibilities he assumed." *Id.* (citing *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1978)).

In Scheffler v. Adams & Reese, LLP, 950 So. 2d 641, 653 (La. 2007), the Louisiana Supreme Court held that lawyers serving as co-counsel and sharing fees have no fiduciary relationship vis-a-vis one another:

> [A]s a matter of public policy, based on our authority to regulate the practice of law pursuant to the constitution, no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's prospective interests in a fee. To allow such an action would be to subject an attorney to potential conflicts of interest in trying to serve two masters and potentially compromise the attorney's paramount duty to serve the best interests of the client.

While an unethical fee-sharing agreement between lawyers may subject them to discipline, it is less clear whether the unethical nature of the agreement will bar its enforcement as between the parties.[79] The United States Court of Appeals for the Seventh Circuit has held that an agreement to divide fees is unenforceable if the agreement violated the applicable professional conduct rules. *See Kaplan v. Pavalon & Gifford*, 12 F.3d 87, 92 (7th Cir. 1993); *see also In re Estate of Katchatag*, 907 P.2d 458, 464-65 (Alaska 1995) (following *Kaplan*); *see also Lemond v. Jamail*, 763 S.W.2d 910, 914 (Tex. App. 1988) (holding that fee-splitting agreement was void because it violated public policy). *But see King v. Housel*, 556 N.E.2d 501, 504-05 (Ohio 1990) (lawyer estopped from claiming that fee-splitting agreement was invalid); *see Grasso v. Galanter,* No 2:12-cv-00738, 2013 WL 5537289, at *3 (D. Nev. Sep. 20, 2013) (same). *See generally* Joseph M. Perillo, *The Law of Lawyers, Contracts is Different*, 67 Fordham L. Rev. 443, 447-48 (1998) (arguing that under the Restatement of

[79] Louisiana courts have on occasion enforced oral contingent fee agreements that otherwise violated Rule 1.5(c). *See Classic Imports, Inc. v. Singleton*, 765 So. 2d 455, 458-59 (La. Ct. App. 4th Cir. 2000); *Tschirn v. Secor Bank*, 691 So. 2d 1290, 1294 (La. Ct. App. 4th Cir. 1997).

the Law Governing Lawyers, courts have "total discretion" as to whether a lawyer is entitled to compensation despite violation of disciplinary rules).

Some Louisiana courts have permitted lawyers to share fees in an amount in proportion to the services rendered when the lawyer's fee-division agreement did not comport with the Louisiana Rules of Professional Conduct. *In Dukes v. Matheny*, the Louisiana First Circuit Court of Appeals held as follows:

> [Louisiana] courts have declined to apply the joint venture theory to support an equal division of the fee when the attorneys have not been jointly involved in the representation of the client. *See Brown v. Seimers*, 726 So. 2d 1018 (La. Ct. App. 5th Cir. 1999); *see also Matter of P & E Boat Rentals, Inc. v. Martzell, Thomas & Bickford*, 928 F.2d 662, 665 (5th Cir. 1991). Rather, the apportionment of the fee in those types of cases has been based on quantum meruit. *Brown*, 726 So. 2d at 1023. Such a ruling is in accord with Rule 1.5(e) of the Rules of Professional Conduct . . . .

Dukes v. Matheny, 878 So. 2d 517 (La. Ct. App. 1st Cir. 2004); *see also Chimneywood Homeowners Ass'n, Inc. v. Eagan Ins. Agency, Inc.*, 57 So. 3d 1142, 1152-53 (La. Ct. App. 4th Cir. 2011) (dispersing fee "according to the respective services and contributions of the attorneys for work performed and other relevant factors"); *Bertucci v. McIntire*, 693 So. 2d 7, 9 (La. Ct. App. 5th Cir. 1997) (awarding fees in quantum meruit where division agreement was made in violation of the Rules of Professional Conduct); *see also*; *Huskinson & Brown, LLP v. Wolf*, 84 P.3d 379, 385 (Cal. 2004) (stating that noncompliance with ethics rules invalidates firms' agreements to divide fees but does not forbid quantum meruit action).[80] However, at least one Louisiana appellate court declined even to consider the merits of a claim that a lawyer in violation of the Rules may be subject to fee forfeiture. *See Brown v. Seimers*, 726 So. 2d 1018, 1020 (La. Ct. App. 5th Cir. 1999) ("This complaint . . . should be raised with the Bar Association").

A referring lawyer cannot share a legal fee if the lawyer has a conflict of interest that prohibits the lawyer from performing legal services in connection with the matter. *See* ABA Formal Op. 474 (Apr. 21, 2016) ("Referral Fees and Conflict of Interest"). *But see Wootan & Saunders, APC v. Diaz*, 2018 WL 1517030 (La. Ct. App. 4th Cir. 2018) (enforcing fee-sharing agreement despite that referring counsel had a concurrent conflict of interest). Because each fee-sharing lawyer in Louisiana must actually represent the client, each lawyer owes the client all of the duties attendant to a lawyer-client relationship—including the duty of loyalty.

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[80] Note that a fee-sharing contract with a nonlawyer made in violation of Louisiana Rule of Professional Conduct 5.4 is null and void. *See "We the People" Paralegal Servs., LLC v. Watley*, 766 So. 2d 744 (La. Ct. App. 2d Cir. 2000) (holding that a fee-sharing agreement with a paralegal services firm was null and void, but remanding to allow the firm to state a cause of action for unjust enrichment); *see also In re Watley*, 802 So. 2d 593, 594 n.2 (La. 2001).

A referring lawyer who is disbarred or suspended from the practice of law cannot earn a referral fee. *See* R.I. Ethics Advisory Panel Op. 91-71 (Oct. 1991); Ind. St. Bar Op. 9 (1991); Fla. Bar Op. 90-3 (1990). A disbarred lawyer no longer shares "joint representation" of the client and no longer is a "lawyer" for the purposes of fee sharing. *See* La. Rules of Prof'l Conduct r. 5.4 (2004) (stating that a lawyer generally may not share fees with a nonlawyer). However, the lawyer may be permitted to collect in quantum meruit the value of services provided prior to disbarment or suspension from practice. *See Brown v. Seimers*, 726 So. 2d 1018, 1023 (La. Ct. App. 5th Cir. 1999). *But see* N.Y. St. Bar Op. 609 (1990) (implying that no recovery in quantum meruit is permitted when the matter for which a lawyer seeks compensation is the same one that gave rise to discipline).

Finally, a lawyer who receives a to-be-shared fee must place it in trust prior to distribution:

> When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer's own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

ABA Formal Op. 475 at 3 (Dec. 7, 2016).

Fee-Collection

Under the Louisiana Civil Code, contracts generally have the effect of law only as between the parties. *See* La. Civ. Code Ann. art. 1983 Therefore, if a lawyer is retained by another lawyer to work on a matter, the lawyer generally should look to the retaining lawyer for fee payment. In contrast, if a lawyer is retained by the client to work on a matter, the lawyer should look to the client for payment.[81] For these reasons, a lawyer working with another lawyer on a matter should clarify in writing who is responsible for payment.

Fee Financing

On November 27, 2018, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal ethics opinion on *A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee*. *See* ABA Formal Op. No. 484 (Nov. 27, 2018). When a lawyer facilitates the financing of a fee through referring the client to a finance company or broker, the lawyer must comply with Rule 1.4 and communicate sufficient information to the enable the client to make an informed decision about whether to

[81] At least one court has suggested that a lawyer retained by another lawyer already representing a client may establish "some privity of contract" with the client by way of "a stipulation pour autrui." *See Dereyna v. Pennzoil Exploration*, 880 So. 2d 124, 127 (La. Ct. App. 3d Cir. 2004).

undertake the financing arrangement. Among other things, the lawyer should consider providing the following to the client:

1. A description of the lawyer's financial and professional relationship with the finance company.
2. A description of how the lawyer's fee will be paid by the finance company and what information will be shared between the company and the lawyer.
3. A description of the costs, benefits, alternatives, and potential downsides of the transaction to the client.
4. A description of terms of the financing arrangement to the extent "known or understood by the lawyer."
5. Disclosure as to whether the lawyer will charge a higher fee because of the financing arrangement.
6. Any "other factor that the lawyer knows or reasonably should know to be material to the financing of the representation."

See id. at 5-6.

In addition to making these disclosures, the lawyer must assure that the finance company will not "direct or regulate the lawyer's professional judgment."[82] *See id.* at 7. The lawyer must also assure that the overall fee remains "reasonable." *Id.* And, the lawyer must obtain the client's informed consent to the disclosure of any confidential information about the client's matter to the finance company. *Id.* at 8.

Finally, the lawyer must assure that the financing arrangement does not give rise to a conflict of interest due to such things as: (1) a past or present lawyer-client relationship between the lawyer and the finance company; or (2) a business interest that the lawyer has in the transaction or finance company. In the event that such a conflict exists, the lawyer must get the client's informed consent to the lawyer's continued representation.[83]

Responsibility for Expenses

A lawyer is not personally responsible to third persons who supply goods or services to further a client's case if the lawyer's agency is apparent and the client/principal is disclosed. *See Penton v. Healy*, 863 So. 2d 684, 692 (La. Ct. App. 4th Cir. 2003) (finding no evidence that lawyer was a disclosed agent for client). However, a lawyer may become

[82] The committee noted that if the finance company pays the lawyer only a portion of the amount financed, impermissible fee sharing does not occur. Said the committee: "Such terms do not constitute fee sharing in violation of Model Rule 5.4(a) because the financing or subscription fee is basically an administrative fee that is deducted from the payment to the lawyer. This is akin to a merchant fee that credit card companies charge. It is settled that lawyers' payment of credit card merchant fees does not constitute impermissible fee-sharing." *See id*. at 9-10.

[83] If the lawyer owns an interest in the finance company, the informed consent would have to comply with the detailed requirements of Rule 1.8(a).

personally liable if the lawyer expressly or impliedly pledges personal responsibility. *See id.*; *see also Weeden Eng'g Corp. v. Hale*, 435 So. 2d 1158, 1160 (La. Ct. App. 3d Cir. 1983).

Unreasonable Expenses

Under paragraph (a) of this rule, courts may inquire into the reasonableness of a lawyer's litigation-related expenses as well as his legal fees. It constitutes sanctionable misconduct to "pad" legitimate expenses, and to charge for "fictitious expenses." *In re Dyer*, 750 So. 2d 942, 948 (La. 1999); *see also In re Mitchell*, 145 So. 3d 305 (La. 2014) (permanently disbarring lawyer for hundreds of unsupported expense reimbursement requests over a period of several years).

Trust Accounting

Paragraph (f) of this rule, unlike the comparable ABA Model Rule, sets forth the following accounting guidelines for fees paid in advance of services.

Type of Funds	Proper Account	Applicable Rules
Fee for lawyer's general availability (unrelated to particular matter)	Operating account	1.5(f)(1)
Fixed or minimum fee for future services on particular matter	Operating account if undisputed, trust account if "reasonably" in dispute	1.5(f)(2); 1.5(f)(5)
Advance deposit for fees, costs or expenses to be incurred in the future	Trust account, but lawyer may transfer funds to operating account as fees are earned or costs are incurred (without further client authorization but with periodic accountings)	1.5(f)(3-4)
"Reasonably" disputed funds[84]	Trust account	1.5(f)(2); 1.5(f)(5-6)

Collecting Fees After Termination

A lawyer who is discharged by a client is generally entitled to recover in quantum meruit for any services provided prior to termination. *See Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La.1979); *see generally* Restatement of Law (Third) Governing Lawyers §

[84] The term "reasonably" appears in quotes in the table above because the Louisiana Supreme Court has held that a lawyer is required to place only "reasonably" disputed funds into his trust account. Funds that the client disputes without reasonable basis are not required to be placed into trust. *See In re Lucius*, 863 So. 2d 516 (La. 2004).

40 (2000). In determining the appropriate quantum meruit amount to be paid to a discharged lawyer, courts consider the following factors:

> (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.

See La. Rules of Prof'l Cond. R. 1.5(a); *Saucier*, 373 So. 2d at 110 (applying similar factors from former disciplinary rule DR 2-106); *Chimneywood Homeowners Association, Inc. v. Eagan Ins. Agency, Inc.*, 57 So. 3d 1142, 1147-48 (La. Ct. App. 4th Cir. 2011) (applying Rule 1.5(a) factors in allocating quantum meruit amount to discharged lawyer); *Mitchell v. Bradford*, 961 So. 2d 1288, 1293 (La. Ct. App. 4th Cir. 2007) (applying Rule 1.5(a) factors in quantum meruit evaluation); *Mie Properties-La, L.L.C. v. Carey*, 213 So. 3d 1274, 1281 (La. Ct. App. 1st Cir. 2017) (applying factors in holding that an "attorney fee award to lessor in the amount of $21,500 was excessive" in a "relatively simple case" when the lease agreement provided "for a 10 percent attorney fee," which equated to "$7,080.36").

A lawyer terminated for cause may suffer a fee reduction as a result of the fault that led to discharge. In *O'Rourke v. Cairns*, the Louisiana Supreme Court held as follows:

> We therefore hold that in cases of discharge with cause of an attorney retained on contingency, the trial court should determine the amount of the fee according to the *Saucier* rule, calculating the highest ethical contingency to which the client contractually agreed in any of the contingency fee contracts executed. The court should then allocate the fee between or among discharged and subsequent counsel based upon the *Saucier* factors. Thereafter, the court should consider the nature and gravity of the cause which contributed to the dismissal and reduce by a percentage amount the portion discharged counsel otherwise would receive after the *Saucier* allocation.

O'Rourke v. Cairns, 683 So. 2d 697, 704 (La. 1996); *see also Buras v. Ace Dynasty Transp. Corp.*, 731 So. 2d 1010, 1013 (La. Ct. App. 4th Cir. 1999) ("Considering the nature and gravity of the cause for which [the client] discharged [the lawyer], we do not believe the trial court erred in its reduction of the discharged lawyer's portion of the fee by ten percent."); *see also Gillio v. Hanover American Ins. Co.*, 212 So. 3d 588, 592 (La. Ct. App. 1st Cir. 2017).

Criminal Practice

Whether a fee charged by a criminal defense lawyer is reasonable turns on the factors set forth in Rule 1.5(a). However, a Louisiana criminal defense lawyer may base the lawyer's fee in part on the gravity of the charges lodged against their clients. There is authority suggesting that the seriousness of the charges is a reasonable consideration in structuring a fee arrangement. *See* Standards for Criminal Justice: Defense Function std. 4-3.3(f) (Am. Bar Ass'n 1993); *see also* La. Rules of Prof'l Conduct r. 1.5(a)(4) (2004) (relating to the "amount involved"). Of course, criminal defense lawyers may never charge a fee that is contingent in any respect on the outcome of the prosecution. *See id*. r. 1.5(d)(2). A fee is "contingent" if it is paid by the client for a lawyer-guaranteed result. *See In re Gold*, 734 So. 2d 1210, 1210-11 (La. 1999).

Disciplinary Sanctions

When a lawyer violates Rule 1.5, the following sanctions are generally appropriate: *disbarment*, if the lawyer knowingly violated the rule, intended to obtain a benefit for himself or another, and the lawyer's conduct caused serious or potential injury to a client, the public, or the legal system; *suspension*, if the lawyer knowingly violated the rule, and caused serious or potential injury; *reprimand*, if the lawyer negligently violated the rule, and caused injury or potential injury; and, *admonition*, if the lawyer's conduct was an isolated instance of negligence that caused little or no actual or potential injury. *See* Standards for Imposing Lawyer Sanctions stds. 7.0-7.4 (Am. Bar Ass'n 1992). Reprimand is generally the appropriate sanction in most cases of a violation of a duty owed to the legal profession. *See id.* std. 7.3 cmt. Nevertheless, in Louisiana, the sanction for charging an excessive fee ranges from reprimand to disbarment. *See In re Bailey*, 115 So. 3d 458 (La. 2013); *In re Levingston*, 755 So. 2d 874, 876 n.6 (La. 2000) (citing *In re Juakali*, 699 So. 2d 361 (La. 1997); *In re Little*, No. 95-DB-009, slip op., at 3 (La. 1996); *In re Watkins*, 656 So. 2d 984 (La. 1995); *In re Quaid*, 646 So. 2d 343 (La. 1994); *In re Ford*, 30 So. 3d 742 (La. 2010); *In re Booth*, 6 So. 3d 158 (La. 2009); *In re Petal*, 972 So. 2d 1138 (La. 2008). Notably, the Louisiana Supreme Court permanently disbarred a lawyer for multiple violations of Rule 1.5(f)(5), holding that the lawyer's failure to refund unearned fees to 39 clients was "essentially" conversion of the fees to the lawyer's own use. *In re Fleming*, 970 So. 2d 970, 981-82 (La. 2007) (stating that the lawyer "used a law license as pretext to steal money from the citizens of this state"); *see also In re Avery*, 110 So. 3d 563, 570-72 (La. 2013) (permanently disbarring lawyer for, among other offenses, writing personal checks drawn on client trust account and failing to refund unearned fees); *In re Bates*, 33. So. 3d 162 (La. 2010) (permanently disbarring lawyer for accepting more than $51,000 in fees and failing to do any substantial work or refund the funds); *In re Mitchell*, 145 So. 3d 305 (La. 2014) (permanently disbarring lawyer for hundreds of unsupported expense reimbursement requests over a period of several years); *In re Lester*, 31 So. 3d 333 (La. 2010) (disbarring lawyer for multiple violations of Rule 1.5, among several other rules violations); *In re Toaston*, 225 So. 3d 1066 (La. 2017) (holding that "permanent disbarment was appropriate sanction for attorney's numerous instances of misconduct," including several violations of Rule 1.5); and, *In re Gomez*, 29 So. 3d 473 (La. 2010) (disbarring lawyer for failure to refund unearned fees, failure to promptly remit funds to third-party medical provider, and using client funds for unauthorized purposes); *In re Burkart*, No. 2018-B-1077, 2018 WL

5816846 (La. 2018) (disbarring lawyer for, among other offenses, failing to return unearned fees to clients and intentionally evading clients by ignoring phone calls).