CLIENT-LAWYER RELATIONSHIP: MRPC 1.5
BACKGROUND — TYPES OF FEES

- Hourly
- Flat fee for routine matter
- Contingent fee
- On retainer — period contract
- Hybrid fees
RULE 1.5: GENERAL RULE

(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;
RULE 1.5: FACTORS FOR REASONABLENESS

(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.
RULE 1.5: CONTINGENT FEES

(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 and 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; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.
RULE 1.5 (C) CONTINUED...

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.
RULE 1.5 — PROHIBITED CONTINGENT FEES

(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.
RULE 1.5: DIVISION OF FEES

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.
RULE 1.5 — COMMENT 1

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.
ABA FORMAL OP. 93-379

- A lawyer may **NOT** charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office.

- The lawyer **MAY** recoup expenses reasonably incurred in connection with the client’s matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer’s actual cost for the services rendered.

- A lawyer **may NOT** charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services. [**NO SURCHARGE**]
RULE 1.5 — COMMENT 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.
RULE 1.5 — COMMENT 2

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.
RULE 1.5 — COMMENT 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.
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.
COMMENT - 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.

Notwithstanding that early resolution of a case that was never really in doubt, the families' lawyers received at least a third of the settlement in contingency fees . . . that sum was equal to at least $25,000 an hour to each plaintiff lawyer involved in the case, in exchange for what amounted to nothing more than routine legal services.”
RULE 1.5 — COMMENT 7

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.
RULE 1.5 — COMMENT 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.

SUPREME COURT: when a litigant's recovery constitutes taxable income, such income includes portion of recovery paid to litigant's attorney as contingent fee.
ABA FORMAL OP. 16-474

Rule 1.5(e) allows lawyers who are not in the same firm to divide a fee under certain circumstances.

A lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client.
ABA FORMAL OP. 16-474

Fee arrangements under Model Rule 1.5(e) are subject to Rule 1.7.

Unless a client gives informed consent confirmed in writing, a lawyer **may not accept a fee** when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.
CLIENT-LAWYER RELATIONSHIP: DECLINING OR TERMINATING REPRESENTATION

MRPC 1.16
RULE 1.16: LAWYER MUST WITHDRAW

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

• (1) Representation will result in violation of the rules of professional conduct or other law;
• (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; OR
• (3) the lawyer is discharged.
RULE 1.16: LAWYER MAY WITHDRAW CONTINUED...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

• (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

• (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
RULE 1.16: LAWYER MAY WITHDRAW

(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
RULE 1.16: LAWYER **MAY** WITHDRAW CONTINUED...

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.
RULE 1.16: NOTICE REQUIREMENT

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
RULE 1.16: TERMINATION OF REPRESENTATION

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as:

• giving reasonable notice to the client,
• allowing time for employment of other counsel,
• surrendering papers and property to which the client is entitled AND
• refunding any advance payment of fee or expense that has not been earned or incurred.
RULE 1.16: CLIENT’S PAPER EXCEPTION

The lawyer may retain papers relating to the client to the extent permitted by other law.
1.16 COMMENTS: MANDATORY WITHDRAWAL

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.

The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.
1.16 COMMENTS: WITHDRAWAL FROM APPOINTED REPRESENTATION

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.

Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct.
1.16 COMMENTS: EXPLANATION FOR WITHDRAWAL

The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation.

The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.
A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.

Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences.
[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The lawyer may retain papers as security for a fee only to the extent permitted by law.
Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer retained by an insurance company notify the insurance company that the insured client he was assigned to represent is not cooperating in the defense of the client’s lawsuit?

ANSW: If an insured fails to communicate with a lawyer who is retained to defend the insured, then the lawyer may withdraw from the representation. In that event, the lawyer must protect the insured’s confidential information and may not, in the absence of the insured’s consent, disclose to the insurance company the reason for the withdrawal.
In connection with moving to withdraw from the suit, the lawyer should avoid disclosing, either to the court or to the insurance company, the specific reason for the withdrawal.

The lawyer instead should provide only a general explanation that professional considerations require withdrawal, although there are circumstances in which a court may require that additional information be provided to the court.
RULE 1.18 — PROSPECTIVE CLIENTS

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
RULE 1.18 — PROSPECTIVE CLIENTS

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).
RULE 1.18 — PROSPECTIVE CLIENTS

(c) continued...

If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
RULE 1.18 — PROSPECTIVE CLIENTS

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
RULE 1.18 — PROSPECTIVE CLIENTS

(d)(2) OR - the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.
An attorney undertook the representation of a client in a breach of contract claim and began working on the matter.

A few weeks later, the opposing party in the litigation consulted with another lawyer in the attorney’s firm about the same matter, but during the consultation, disclosed no confidential information except the identity of the other party and the nature of the claim.

The other lawyer did a routine conflict check, quickly discovered the conflict with this new potential client, and immediately declined to represent the party. The lawyer and the attorney already representing the first client discussed the situation.
Q: Would it be proper for the attorney to disclose to his client that the opposing party had come in for a consultation with another lawyer in his firm?

A: The attorney may NOT disclose to the client that the opposing party consulted with another lawyer in the firm, but he may continue to represent the client if the attorney does not use any information gleaned from the other party’s consultation against the other party.
ACCEPTING APPOINTMENTS

Model Rule 6.2
RULE 6.2 - ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1.

An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.

A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.
COMMENT 2 - APPOINTED COUNSEL

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular.

Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.
COMMENT 3 - APPOINTED COUNSEL

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

(Note that if the client declines the representation, no attorney-client relationship exists, except that the attorney must still fulfill whatever tasks the court orders.)
Lack of expertise or experience in a particular subject area is the basis upon which relief from appointment is most often sought.

A lawyer arguing that a particular appointment is beyond his abilities may be required to make a “showing of incompetence” before the court will grant a motion to withdraw.

Even then, the court may decide the lawyer is capable of becoming competent, or may tell the lawyer to “affiliate” with other counsel.
INCOMPETENCE & GOOD CAUSE

*Cunningham v. Sommerville*, 388 S.E.2d 301 (W. Va. 1989) (even if lawyer shows inability to become competent within reasonable time, court may choose to appoint more experienced lawyer as co-counsel)

*Reese v. Owens-Corning Fiberglas*, 962 F. Supp. 1418 (D. Kan. 1997) (court first appointed mentor for sole practitioner objecting to appointment to represent indigent Title VII plaintiff but eventually removed him altogether in harshly worded opinion)

*DeLisio v. Alaska Supreme Court*, 740 P.2d 437 (Alaska 1987) (although lawyer had not practiced criminal law in twenty years, his assertion that he could not provide adequate representation was “disingenuous”)
GOOD CAUSE & INCOMPETENCE

*Stern v. Cnty. Court, 773 P.2d 1074 (Colo. 1989)* (en banc) (although lawyer had not voluntarily represented a criminal defendant in eleven years, court believed he could become competent)

*In re Member of Bar, 47 A.3d 972 (Del. Super. Ct. 2012)* (lawyer who was not permitted to withdraw from appointments in three family court cases for which he believed he lacked necessary skills could have sought substitute counsel but persistently “attempted to throw the burden back on the Court”; *public reprimand*).
Many courts have held that forcing lawyers to accept appointments without compensation constitutes an impermissible taking.
According to ABA Formal Opinion 06-441, which treats appointed counsel in pari materia with public defenders, a lawyer “must not accept new cases” if it would make it impossible to represent existing clients competently.

The opinion suggests the lawyer ask her supervisor to transfer some of her cases to another lawyer and, if the supervisor's resolution of the problem is not “reasonable,” the lawyer must take further action, such as going over the supervisor's head to a governing board (opinion footnotes “reporting up” obligation Rule 1.13 imposes on corporate lawyers encountering constituent wrongdoing), or moving to withdraw from cases until her workload is manageable.
When it is not the money but the lawyer's aversion to the case or client that is the basis for withdrawal, the quantum of “repugnance” required to meet the good-cause test is higher for appointed counsel than for retained counsel.

Rule 1.16(b)(4) states the general rule: A lawyer may withdraw from a representation if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

The more specific provision in Rule 6.2(c) for court appointments raises the threshold to “the client or the cause is so repugnant to the lawyer as to be likely to impair” the representation.
CONSEQUENCES

Although the obligation to accept the court's appointment is usually enforced by the judge making the appointment rather than through the disciplinary process, lawyers have been disciplined for refusing to proceed with a representation after losing the motion to withdraw.

Rule 1.16(c) fits in with Rule 6.2 by providing that if a tribunal orders a lawyer to continue representing someone, the lawyer must obey “notwithstanding good cause for terminating the representation.”

See Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927 (Tex. App. 1999) (Rule 1.16(c) specifically prohibits disobeying court order to continue representing someone and therefore takes precedence over Rule 3.4(c), which more generally provides that open disobedience of ruling whose validity is challenged does not constitute misconduct)
CONSEQUENCES OF DECLINING

Although the obligation to accept the court’s appointment is usually enforced by the judge making the appointment rather than through the disciplinary process, lawyers have been disciplined for refusing to proceed with a representation after losing the motion to withdraw.

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On the possible disciplinary consequences of complying with an order of appointment the lawyer believes will entail violation of the ethics rules, see *Burke v. Lewis, 122 P.3d 533 (Utah 2005)* (“Where an appointment raises ethical concerns, . . . we hold that good-faith compliance with an appointment order provides lawyers with a safe harbor in which they can be free from exposure to disciplinary action.”)

*In re S.C., 88 A.3d 1220 (Vt. 2014)* (appointed counsel's concern that presenting unsupported argument at client's insistence instead of filing *Anders* brief would expose him to disciplinary charges “may be sufficiently assuaged by noting that even an arguably frivolous claim will not be deemed to violate *Rule 3.1* where, as here, a court categorically refuses to grant motions to withdraw in deference to overriding state interests”);

*Fla. Ethics Op. 81-9 (1982)* (“it is the opinion of the Committee that a court-appointed attorney who, at the insistence of his client and in accordance with the procedure set forth by the United States Supreme Court ... commences a [meritless] appeal . . . may not thereafter be said to have acted unethically in commencing the appeal”).