

WARNING AND DISCLAIMER: This information was prepared by The Bar Plan and is for general information purposes only. It should not be construed as legal advice or legal opinion with regard to any specific circumstance or set of facts. This form document is not, and cannot be, inclusive of all the possible or required contents for such agreements, and each attorney preparing such an agreement must make an independent evaluation of the necessary and required contents, given the circumstances of the representation.

Fee Agreement Basics

In representations not involving a contingent fee, division of fee with a lawyer not in the same firm, or a non-refundable fee, there is no specific requirement under the Tennessee Rules of Professional Conduct that a fee agreement be in writing. However, it is recommended that lawyers reduce fee arrangements to writing to avoid misunderstandings and as elements of proof in the event of a dispute with the client. Supreme Court Rule 1.5(b) requires that when a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Comment [2] to the rule cautions that in a new lawyer-client relationship, the fee must be promptly established.

The detail that is necessary in a fee agreement is defined by the circumstances. A lawyer has a duty to communicate with the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. [Rule 1.4(b) and Comment to Rule 1.5]

The scope of representation should be set forth and any limits on what the lawyer will do must be clearly spelled out. A lawyer may limit the objectives of the representation if the client gives informed consent [Rule 1.2(c)] However, any limitation must accord with the Tennessee Rules of Professional Conduct and other law. A client may not, in the fee agreement, be asked to agree to representation so limited in scope as to violate Rule 1.1 relating to competence or to surrender the right to terminate the lawyers' services or the right to settle litigation that the lawyer might wish to continue, or limit the lawyer's duties or liability under the Tennessee Rules of Professional Conduct.

If a division of fees with a lawyer from another firm is involved, the overall fee must be reasonable, and the client's consent must be obtained. This consent must be confirmed in writing. The division may be based on the proportion of services performed by each lawyer or each lawyer must assume joint responsibility for the representation. [Rule 1.5(e)]

If you don't want to represent the client in an appeal from the underlying representation, state so specifically. If your agreement is silent on this point, you may find that you have to handle the appeal under the terms of the original agreement.

The agreement should set forth how fees, expenses, and costs will be handled and billed, when payment is expected, and what is included in the Fee (i.e. billing for telephone calls). It's a good idea to review T.R.P.C. 1.5-Fees.

When billing hourly, the current rates for both attorneys and paralegals should be set forth, together with a similar discussion of expenses and costs.

Rates for copying, mileage, computerized legal research, and other charges must be disclosed. If those rates differ from your firm's actual costs, the client must be advised of and consent to the difference.

The termination of the representation should also be disclosed, including under what circumstances the attorney may withdraw, what will happen if the fees are not paid, and disposition of the client's file.

Your file retention policy should be set out. Regarding a File Retention Policy as discussed in the Sample Engagement Letter, a form policy is available from The Bar Plan.

Forms alone cannot tell a lawyer how to comply. Rather, compliance will result from the lawyer's understanding of the interaction of the Rules and any applicable statutes to their practice area. For example, lawyers doing workers compensation law should be aware that there are regulations on charging fees in this area and their fees are subject to the regulation by the worker's compensation division or commission. Likewise, fees must be approved in other areas of law practice, such as bankruptcy, matters in which a minor is a client, probate, etc. These fee agreements and guidelines cannot address all the specifics that may be necessary for every client matter.

Just as important as the clauses a fee agreement may contain are clauses that are not permitted. Limited examples of such possible clause are:

The "Slow Down Work" Clause - An attorney does not have the option of unilaterally slowing down the progress of the case simply because he or she is not happy with the progress of payment, at least not without the consent of the client and then only to the extent permitted by Rule 3.2 Expediting Litigation

The "You Have to Agree to Let Me Withdraw" Clause – A lawyer cannot compel the client to sign a statement concerning withdrawal contrary to the client's true wishes or best interests.

The "I Say When the Fee Is Reasonable" Clause – A contract cannot determine the reasonableness of a fee. Rather, reasonableness determined with reference to all of the factors set forth in Rule 1.5.

The "You Can Longer Object to My Fee" Clause – The Rules of Professional Conduct require a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them. The mere passage of time between billing, payment and the request for an accounting does not act to limit this duty.

With the above thoughts in mind, below is a basic starting template for a form Hourly Fee Agreement.

Sample Fee Agreement - Hourly

FIRM NAME
STREET
CITY, STATE, ZIP
PHONE
DATE
LAWYER-CLIENT FEE AGREEMENT

_____ ("Lawyer"), will provide legal services to _____
("Client"), on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Lawyer will take no action on behalf of the client until Client returns a signed copy of this Agreement and pays the initial deposit (advanced fee) called for under Paragraph 5.

2. SCOPE OF SERVICES. Client hires Lawyer to provide legal services in the following matter:
[Describe matter - See User Note 1 Below] _____

Lawyer will provide those legal services reasonably required to represent Client. Lawyer will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. If a court action is filed, Lawyer will represent Client through **[select as appropriate]** [trial] and [post-trial motions]. This Agreement does not cover representation on appeal or in execution proceedings after judgment. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate Agreement.

3. CLIENT. The lawyer is representing the Client _____ (name) _____ only in this matter. It is understood by Client and any third party who may be assisting Client financially, emotionally or otherwise, in this matter, that lawyer's duty is to act in the best interest of the Client and lawyer cannot share information about Client's case with anyone other than Client without express permission. **[See User Note 2 Below]**

4. RESPONSIBILITIES OF THE PARTIES. Client agrees to be truthful with Lawyer, to cooperate, to keep Lawyer informed of any information or developments which may come to Client's attention, to abide by this agreement, and to pay Lawyer's bills on time. Further, while it is impossible to predict the course of a representation, it may be important for Lawyer to contact Client immediately, or upon short notice, to confer with Client regarding the status of Client's case. An inability to do so may result in Client's case being prejudiced and detrimentally affect the outcome of the case. Accordingly, Client agrees to keep Lawyer informed of Client's current address, telephone number and whereabouts. If Client leaves town, for example, to travel on

business or vacation, Client agrees to notify Lawyer before leaving of the expected duration of the trip and how Client may be contacted in the meantime.

5. FEE

(Option 1) DEPOSIT (ADVANCED FEE). Client agrees to pay Lawyer an initial fee deposit of \$_____ by_(date)_. The hourly charges will be credited against the fee deposit. The initial fee deposit, as well as any future fee deposit, will be held in a trust account. Client authorizes Lawyer to use that fund to pay the fees and other charges as they are incurred. Billing statements detailing the charges against the fee deposit will be sent monthly to the client. Withdrawal from the trust account will be made 10 days after the date of this billing statement. Client acknowledges that the fee deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the fee deposit is depleted, Lawyer reserves the right to receive further reasonable fee deposits. When a trial or arbitration date is set, Client agrees to pay all sums then owing and fees estimated to be incurred in preparing for and completing the trial or arbitration, as well as the jury fees and court costs or arbitration fees, expert witness fees and other costs likely to be assessed.

Client agrees to pay all fee deposits after the initial fee deposit within _____ days of being requested by Lawyer. Any unused fee deposit at the conclusion of Lawyer's services will be refunded.

(Option 2) Non-Refundable Fee – [See User Note 3, below]

6. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Lawyer's prevailing rates for all time spent on Client's matter by Lawyer's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners	_____ /hour
Partners	_____ /hour
Associates	_____ /hour
Paralegals	_____ /hour
Law clerks	_____ /hour

The time charged will include the time Lawyer spends on telephone calls relating to Client's matter, including calls with Client, witnesses, opposing counsel or court personnel. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting, court hearing or other proceeding, each will charge for the time spent.

7. COSTS AND EXPENSES

(a) In General. Lawyer will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include, service of process

charges, filing fees, court and deposition reporters' fees, jury fees, notary fees, deposition costs, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultants' fees, expert witness, professional, mediator, arbitrator and/or special master fees and other similar items.

(b) Out of Town Travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Lawyer's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

ALTERNATE ONE

(c) Experts, Consultants, and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants, or investigators. Client agrees to pay such fees and charges. Lawyer will consult with client on the selection of any expert witnesses, consultants, etc., to be hired and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

ALTERNATE TWO

(c) Experts, Consultants, and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants, or investigators. Lawyer will select, in consultation with client, any expert witnesses, consultants or investigators to be hired and Client will be informed of persons chosen and their charges.

Client authorizes Lawyer to incur all reasonable costs and to hire any investigators, consultants, or expert witnesses reasonably necessary in Lawyer's judgment unless one or both of the clauses below are initialed by Lawyer.

Lawyer shall obtain Client's consent before incurring any costs in excess or \$_____.

Lawyer shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

8. BILLING STATEMENTS. Lawyer will send Client monthly statements for fees and costs incurred. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount. If the Client objects to any charges against the fee deposit, Client agrees to notify Lawyer within _____ days. When statement carries a balance due, the balance shall be paid in full within _____ days after the date of such statement.

9. DISCHARGE AND WITHDRAWAL. Client may discharge Lawyer at any time. Lawyer may withdraw with Client's consent or for good cause. When Lawyer's services conclude, all unpaid charges will immediately become due and payable.

Lawyer will maintain Client's file for _____ years after this matter is concluded. Client may request the file at any time during, upon conclusion of, or after conclusion of, this matter. _____ years after the conclusion of this matter, the file may be destroyed without further notice to Client.

10. DISCLAIMER OF GUARANTEE AND ESTIMATES. Nothing in this agreement and nothing in Lawyer's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Lawyer makes no such promises or guarantees. Lawyer's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Lawyer shall not be a guarantee. Actual fees may vary from estimates given.

11. ENTIRE AGREEMENT. This Agreement contains the entire Agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

12. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

13. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent Agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

14. EFFECTIVE DATE. This Agreement will govern all legal services performed by Lawyer on behalf of Client commencing with the date Lawyer first performed services. The date at the beginning of this Agreement is for reference only. Even if this agreement does not take effect, Client will be obligated to pay Lawyer the reasonable value of any services Lawyer may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE LAWYER FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

Client Name _____

Address _____

Telephone: _____

DATED: _____

LAW FIRM

By: _____

(NAME), Partner

User Note 1 - From a risk management perspective, the most important goal of a Fee Agreement is to craft an accurate and unambiguous statement regarding the Scope of the Representation. Insert a clear, unequivocal description of the legal services to be provided, including, if applicable, the level of services -e.g. administrative review, trial, appeal, etc. While the description should fully describe the anticipated services, the attorney should take care in drafting the description to avoid a conclusion by the client that the client can expect to receive more representation or services than the attorney intends to provide.

Further, if an attorney knows, or reasonably should know, of alternative or additional recoveries or causes of action the client has, the attorney should so inform the client, as well as inform the client whether the attorney will represent the client in that/those matters, and if not, to advise the client that independent representation is appropriate if the client wishes to pursue them, to inform the client about potential statute of limitations issues and admonish the client to take action timely. See, for example, *Keef v. Widuch*, 747 N.E.2d 992 (Ill.App. 2001) (Although a representation agreement may limit the scope of representation to a particular legal course of action, the client must be made to understand that the course of action is not the sole potential remedy and that there exist other courses of action that are not being pursued. Workers' compensation attorneys have a duty of care to advise clients about the possibility of third-party actions involving a defective product, that the third-party action could be barred if not brought within the statute of limitations, and either to investigate such claims or to advise the clients to consult other counsel.)

An attorney may not be aware, at the time of the inception of the representation, of other recoveries or causes of action. Ordinarily, they do not become apparent until after the attorney has further investigated the client's matter, or by way of traditional discovery. However, at whatever stage of the representation the attorney knows or should know of the other recovery or cause or action, the duty to so inform the client arises at that time.

User Note 2- Although a representation agreement may limit the scope of representation to a particular legal course of action, if other remedies or even separate causes of action are available to the client the attorney must inform the client of the alternatives and whether the attorney is or will pursue them. Failing to properly inform the client of the alternatives and the lawyer's role in them exposes the attorney to potential malpractice for injuries suffered by the client resulting from missed opportunities in pursuing the alternatives. If the lawyer declines to represent the client in the alternative matters, the lawyer must inform the client of that and that the client should timely seek other counsel to represent them if they wish to pursue them.

User Note 3 – Before attempting to charge a Non-refundable fee, carefully review R.P.C. 1.5 in its entirety, and specifically, paragraph (f) and COMMENT [4a], as well as any and all Tennessee case law developed on the charging, collection, and refundability of a non-refundable fee, e.g. *Stalls v. Pounders*, 2005 Tenn. App. LEXIS 42 (Tenn. Ct. App., Western Section, Jan. 27, 2005. Rule 1.5(f) and COMMENT [4a] are reproduced below:

Rule 1.5(f) - “A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.”

COMMENT [4a] – “A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. Nonrefundable fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular nonrefundable fee is reasonable, or whether it is reasonable to charge a nonrefundable fee at all, a lawyer must consider the factors that are relevant to the circumstances. Recognized examples of appropriate nonrefundable fees include a nonrefundable retainer paid to compensate the lawyer for being available to represent the client in one or more matters or where the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. RPC 1.5(f) requires a writing signed by the client to make certain that lawyers take special care to assure that clients understand the implications of agreeing to pay a nonrefundable fee.”