

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20210340

Amendments to North Dakota Rules of Professional Conduct 1.5 and 1.15 Regarding Fees

[¶1] On December 8, 2021, the Joint Committee on Attorney Standards submitted proposed amendments to North Dakota Rules of Professional Conduct 1.5 and 1.15 regarding fees. The proposal is available at <https://www.ndcourts.gov/supreme-court/dockets/20210340>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court allowed comment on the proposal. The Court considered the matter, and

[¶2] IT IS HEREBY ORDERED, that as further amended by the Court, the amendments to North Dakota Rules of Professional Conduct 1.5 and 1.15 are ADOPTED effective July 1, 2022.

[¶3] The Supreme Court of the State of North Dakota convened this 2nd day of March 2022, with the Honorable Jon J. Jensen, Chief Justice, and the Honorable Gerald W. VandeWalle, the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, Justices, directing the Clerk of the Supreme Court to enter the above order.

/s/ Petra H. Mandigo Hulm
Clerk
North Dakota Supreme Court

RULE 1.5 FEES

1 **(a)** A lawyer shall not make an agreement for, charge, or collect an
2 unreasonable fee or an unreasonable amount for expenses. The factors to be
3 considered in determining the reasonableness of a fee include the following:

- 4 (1) the time and labor required, the novelty and difficulty of the
- 5 questions involved, and the skill requisite to perform the legal service
- 6 properly;
- 7 (2) the likelihood, if apparent to the client, that the acceptance of the
- 8 particular employment will preclude other employment by the lawyer;
- 9 (3) the fee customarily charged in the locality for similar legal services;
- 10 (4) the amount involved and the results obtained;
- 11 (5) the time limitations imposed by the client or by the circumstances;
- 12 (6) the nature and length of the professional relationship with the client;
- 13 (7) the experience, reputation, and ability of the lawyer or lawyers
- 14 performing the services; and
- 15 (8) whether the fee is fixed or contingent.

16
17 **(b)** When the lawyer has not regularly represented the client, the basis, rate,
18 or amount of the fee and expenses for which the client will be responsible
19 shall be communicated to the client, preferably in writing, before or within a
20 reasonable time after commencing the representation.

21 **(c)** A fee may be contingent on the outcome of the matter for which the
22 service is rendered, except in a matter in which a contingent fee is prohibited
23 by paragraph (d) or other law. A contingent fee agreement shall be in a writing
24 signed by the client and shall state the method by which the fee is to be
25 determined, including the percentage or percentages that shall accrue to the
26 lawyer in the event of settlement, trial or appeal, litigation and other expenses
27 to be deducted from the recovery, and whether such expenses are to be
28 deducted before or after the contingent fee is calculated. The agreement must
29 identify any expenses for which the client will be liable whether or not the
30 client is the prevailing party. Upon conclusion of a contingent fee matter, the
31 lawyer shall provide the client with a written statement stating the outcome of
32 the matter and, if there is a recovery, showing the remittance to the client and
33 the method of its determination, including itemization of expenses.

1 **(d)** A lawyer shall not enter into an arrangement for, charge, or collect:

- 2 (1) any fee in a domestic relations matter, the payment or amount of
3 which is contingent upon the securing of a divorce or upon the amount
4 of alimony or support, or property settlement in lieu thereof; or
5 (2) a contingent fee for representing a defendant in a criminal case.
6

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

- 9 (1) the division of fee is in proportion to the services performed by each
10 lawyer or each lawyer, by written agreement, assumes joint
11 responsibility for the representation;
12 (2) after consultation, the client consents in writing to the participation of
13 all the lawyers involved; and
14 (3) the total fee is reasonable.
15

16 **(f)** A lawyer may charge a flat, fixed fee or minimum fee for a particular
17 representation with services to be rendered in the future. These funds become
18 the lawyer's property when paid and may be deposited in the lawyer's
19 operating account.
20

21 **(g)** Nonrefundable fees and nonrefundable retainers are prohibited. Any
22 agreement that purports to restrict a client's right to terminate the
23 representation or that unreasonably restricts a client's right to obtain a refund
24 of unearned or unreasonable fees is prohibited.
25

26 ~~**(f)**~~ **(h)** A lawyer may charge for work performed by a legal assistant.

27 ~~**(g)**~~ **(i)** A lawyer may not split legal fees with a legal assistant nor pay a legal
28 assistant for the referral of legal business. A lawyer may compensate a legal
29 assistant based on the quantity and quality of the legal assistant's work and
30 value of that work to a law practice. The legal assistant's compensation may
31 not be contingent, by advance agreement, upon the outcome of a case or
32 upon the profitability of the lawyer's practice.
33
34

Comment

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 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, Rate or Amount of Fee

[2] Ordinarily, when the lawyer has regularly represented a client, they will have an understanding concerning the basis or rate of the fee. In a new lawyer-client relationship, however, an understanding as to the 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. The written statement may be a copy of the lawyer's customary fee schedule or a simple memorandum setting forth the basis, rate or amount of the fee.

[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(e). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not create a conflict of interest. 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.

[4a] Subsection (f) permits arrangements for an agreed upon flat, fixed, or minimum fee that is tied to a lawyer's representation of a client in a particular matter. Payment of this type of fee by a client to the lawyer normally is considered earned when paid, unless the lawyer and the client contemplate that the lawyer will not promptly confer a benefit on the client or promptly perform a legal service for 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.

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

1 obtained. This provision does not preclude a contract for a contingent fee for
2 legal representation in connection with the recovery of post-judgment
3 balances due under support, alimony or other financial orders because such
4 contracts do not implicate the same policy concerns. Contingent fee
5 agreements must be in a writing signed by the client and must otherwise
6 comply with paragraph (c) of this Rule.

7 **Division of Fee**

8 [7] A division of fee is a single billing to a client covering the fee of two or more
9 lawyers who are not in the same firm. A division of fee facilitates association
10 of more than one lawyer in a matter in which neither alone could serve the
11 client as well, and most often is used when the fee is contingent and the
12 division is between a referring lawyer and a trial specialist. Paragraph (e)
13 permits the lawyers to divide a fee on either the basis of the proportion of
14 services they render or by agreement between the participating lawyers if all
15 assume responsibility for the representation as a whole and the client is
16 consulted and does not object. It does not require disclosure to the client of
17 the share that each lawyer is to receive. A lawyer should refer a matter only to
18 a lawyer whom the referring lawyer reasonably believes is competent to
19 handle the matter. See Rule 1.1.

20 [8] Paragraph (e) does not prohibit or regulate division of fees to be received
21 in the future for work done when lawyers were previously associated in a law
22 firm.

23 **Disputes Over Fees**

24 [9] If there is a fee dispute, a lawyer should consider submitting to an
25 established arbitration procedure. Law may prescribe a procedure for
26 determining a lawyer's fee, for example, in representation of an executor or
27 administrator, a class or a person entitled to a reasonable fee as part of the
28 measure of damages. The lawyer entitled to such a fee and a lawyer
29 representing another party concerned with the fee should comply with the
30 prescribed procedure.

31 **Fees for the Services of Legal Assistants**

1 [10] In cases involving fixed fees or contingent fees, the total fees are agreed
2 upon in advance and there should be no separate charge for legal assistant
3 services. In matters charged on the basis of "fee for service" or "charge by the
4 hour", a lawyer may include separate charges for work performed by legal
5 assistants or otherwise include legal assistant hours in calculating the amount
6 of fees to be charged. It may be appropriate to value such services at "market
7 rates" rather than "actual costs" to the lawyer.

8 [11] The lawyer should disclose to the client, either at the outset of the
9 representation or at the point during the representation when the lawyer
10 determines a legal assistant should be used, that the lawyer proposes to use
11 a legal assistant and obtain the client's agreement to any separate charges for
12 legal assistant services.

13 [12] A lawyer may not split fees with a legal assistant, whether characterized
14 as splitting of contingent fees, "forwarding" fees or other sharing of legal fees.
15 The lawyer's obligation is to pay the legal assistant according to the
16 employment agreement. There is no general prohibition against a lawyer
17 recognizing the contribution of the legal assistant with a discretionary bonus.
18 Likewise, a lawyer is not prohibited from compensating a legal assistant who
19 aids materially in a practice with compensation greater than that generally
20 paid to legal assistants in the geographic area working in less lucrative law
21 practices.

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the
23 Attorney Standards Committee on 02/03/84, 03/16/84, 05/23/84, 06/27/84 and
24 07/27/84; Minutes of Joint Committee on Attorney Standards Meetings of
25 06/13/95, 09/15/95, 12/01/95, 06/11/96, 11/15/02, 11/19/04, 06/14/05,
26 11/3/20, 6/15/21.

RULE 1.15 SAFEKEEPING PROPERTY AND PROFESSIONAL LIABILITY INSURANCE DISCLOSURE

1 **(a)** A lawyer shall hold property of clients or third persons that is in a lawyer's
2 possession in connection with a representation separate from the lawyer's
3 own property. Funds shall be deposited in one or more identifiable interest
4 bearing trust accounts in accordance with the provisions of paragraph (f).
5 Other property shall be identified as such and appropriately safeguarded.
6 Complete records of such account funds and other property shall be kept by
7 the lawyer in the manner prescribed in paragraph (h).

8 **(b)** A lawyer may accept credit card payments or electronic funds transfer
9 payments for unearned fees as temporary deposits into the lawyer's general
10 operating account if the funds in which a client or a third-party has an interest
11 are promptly transferred from the general operating account to the client trust
12 account. A lawyer may deposit the lawyer's own funds in a client trust account
13 only for the purpose of paying bank service charges and fees associated with
14 credit card payments or electronic funds transfer payments related to that
15 account, but only in an amount necessary for that purpose.

16 **(c)** A Except as provided in Rule 1.5(f), a lawyer shall deposit into a client trust
17 account legal fees and expenses that have been paid in advance, to be
18 withdrawn by the lawyer only as fees are earned or expenses incurred.

19 **(d)** Upon receiving, in connection with a representation, funds or other
20 property in which a client or third person has an interest, a lawyer shall
21 promptly notify the client or third person. Except as stated in this rule or
22 otherwise permitted by law or by agreement with the client, a lawyer shall
23 promptly deliver to the client or third person any funds or other property that
24 the client or third person is entitled to receive and, upon request by the client
25 or third person, shall promptly render a full accounting regarding such
26 property.

27 **(e)** When, in the course of representation, a lawyer is in possession of
28 property in which two or more persons (one of whom may be the lawyer) claim

1 interests, the property shall be kept separate by the lawyer until the dispute is
2 resolved. The lawyer shall promptly distribute all portions of the property as to
3 which the interests are not in dispute.

4 **(f)** Each trust account referred to in paragraph (a) shall be an interest bearing
5 trust account in an eligible financial institution selected by a lawyer in the
6 exercise of ordinary prudence. An eligible financial institution is a bank,
7 savings bank, trust company, savings and loan association, savings
8 association, credit union, or federally regulated investment company
9 authorized by federal or state law to do business in North Dakota and insured
10 by the Federal Deposit Insurance Corporation, the National Credit Union
11 Share Insurance Fund, or the Federal Savings and Loan Insurance
12 Corporation. Interest bearing trust funds shall be placed in accounts in which
13 withdrawals or transfers can be made by the depositing lawyer or law firm
14 without delay, subject only to any notice period which the depository institution
15 is required to reserve by law or regulation.

16 (1) A lawyer who receives funds of clients or third persons shall
17 maintain a pooled interest bearing trust account for deposit of all such
18 funds received that are nominal in amount or expected to be held for a
19 short period of time. The interest accruing on this account, net of any
20 transaction costs, shall be paid to and administered by the North Dakota
21 Bar Foundation in accordance with Administrative Rule 24 of the
22 Supreme Court of North Dakota. The North Dakota Bar Foundation
23 holds the entire beneficial interest in all interest monies accruing on this
24 account.

25
26 (2) All funds of a client or third person shall be deposited in the account
27 specified in paragraph (f)(1) unless they are deposited in:

28
29 (i) a separate interest bearing trust account for the particular client
30 or third person on which the interest, net of any transaction costs,
31 will be paid to the client or third person; or

32
33 (ii) a pooled interest bearing trust account with subaccounting
34 which will provide for computation of interest earned by each
35 client's or third person's funds and the payment thereof, net of any
36 transaction costs, to the client or third person.
37

1 (3) In determining whether to use the account specified in paragraph
2 (f)(1) or an account specified in paragraph (f)(2), a lawyer should take
3 into consideration the following factors when deciding whether the funds
4 to be invested may be utilized to provide a positive net return to the
5 client or third person:
6

7 (i) the amount of interest which the funds would earn during the
8 period they are expected to be deposited;
9

10 (ii) the cost of establishing and administering the account,
11 including the cost of the lawyer's services and the cost of
12 preparing any tax reports required for interest accruing to a
13 client's or third person's benefit; and
14

15 (iii) the capability of financial institutions described in paragraph (f)
16 to calculate and pay interest on individual accounts or
17 subaccounts.
18

19 (4) As to accounts under paragraph (f)(1), a lawyer or law firm shall
20 direct the depository institution:
21

22 (i) to remit interest or dividends, net of any service charges or
23 fees, on the average monthly balance in the account, or as
24 otherwise computed in accordance with an institution's standard
25 accounting practice, at least quarterly, to the North Dakota Bar
26 Foundation (the foundation); and
27

28 (ii) to transmit with each remittance to the foundation a statement
29 showing the name of the lawyer or law firm for whom the
30 remittance is sent, the rate of interest applied, and the amount of
31 service charges deducted, if any, and the account balance(s) of
32 the period in which the report is made, with a copy of such
33 statement to be transmitted to the depositing lawyer or law firm.
34

35 **(g)** Lawyers who are admitted to practice in a jurisdiction other than the state
36 of North Dakota and lawyers who are associated in a law firm with at least one
37 lawyer who is admitted to practice in a jurisdiction other than the state of North
38 Dakota are exempt from the requirements of paragraph (f) if the lawyer or law
39 firm maintains a pooled interest bearing trust account for the deposit of funds
40 of clients or third persons in a financial institution located outside the state of

1 North Dakota and the interest, net of any service charges and fees, from the
2 account is being remitted to the client or third person who owns the funds, or
3 to a non-profit organization or government agency pursuant to the laws or
4 rules governing lawyer conduct of the jurisdiction in which the financial
5 institution is located. This exemption shall not relieve a lawyer from any of the
6 other obligations imposed by this rule.

7 **(h)** A lawyer shall maintain or cause to be maintained on a current basis
8 records sufficient to demonstrate compliance with the provisions of this Rule.
9 Such records shall be preserved for at least six years after termination of the
10 representation.

11 **(i)** A lawyer shall certify, in connection with the annual renewal of the lawyer's
12 license and in such form as the clerk of the supreme court of North Dakota
13 may prescribe, that the lawyer is complying with the provisions of this Rule.

14 **(j)** The form required in subsection (i) shall also contain a provision for each
15 licensed lawyer to certify (1) whether the lawyer represents private clients; (2)
16 if the lawyer represents private clients, whether the lawyer is currently covered
17 by professional liability insurance; and (3) whether the lawyer intends to
18 maintain such insurance during the next twelve months. A lawyer shall notify
19 the clerk in writing within 30 days if the lawyer's professional liability coverage
20 lapses, is no longer in effect, or terminates for any reason, unless the policy is
21 renewed or replaced without substantial interruption. This information shall be
22 disclosed to the public upon request.

23 **(k)** Lawyer trust accounts, as referred to in paragraphs (a) and (f), shall be
24 maintained only in eligible financial institutions approved by the Disciplinary
25 Board. Every check, draft, electronic transfer, or other withdrawal instrument
26 or authorization must be personally signed or, in the case of electronic,
27 telephone, or wire transfer, directed by one or more lawyers authorized by the
28 law firm.

29 **(l)** A financial institution, to be approved as a depository for lawyer trust
30 accounts, shall file with the Disciplinary Board an agreement, in a form
31 provided by the Board, to report to the Board if any properly payable*
32 instrument is presented against a lawyer trust account containing insufficient

1 funds, whether or not the instrument is honored. The Disciplinary Board shall
2 establish rules governing approval and termination of approved status for
3 financial institutions, and shall annually publish a list of approved financial
4 institutions. No trust account may be maintained in any financial institution that
5 does not agree to make overdraft notification reports. Any overdraft
6 notification agreement must apply to all branches of the financial institution
7 and may not be canceled except upon three days notice in writing to the
8 Board.

9 **(m)** The overdraft notification agreement must provide that all reports made by
10 the financial institution be in the following format:

11 (1) in the case of a dishonored instrument, the report must be identical
12 to the overdraft notice customarily forwarded to the depositor, and
13 should include a copy of the dishonored instrument, if a copy is normally
14 provided to depositors;

15
16 (2) in the case of an instrument that is presented against insufficient
17 funds but which instrument is honored, the report must identify the
18 financial institution, the lawyer or law firm, the account number, the date
19 of presentation for payment, and the date paid, as well as the amount of
20 overdraft created thereby.

21
22 Reports must be made simultaneously with the notice of dishonor* and within
23 the time provided by law for notice of dishonor, if any. If an instrument
24 presented against insufficient funds is honored, then the report must be made
25 within five banking days of the date of presentation for payment against
26 insufficient funds.

27 **(n)** Every lawyer practicing or admitted to practice in this State shall, as a
28 condition thereof, consent to the reporting and production requirements of this
29 Rule.

30 **(o)** Nothing in this rule precludes a financial institution from charging a
31 particular lawyer or law firm for the reasonable cost of producing the reports
32 and records required by this rule.

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Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property. Monies that are the property of clients or third persons, including prospective clients, must be held in one or more interest bearing trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. The determination of whether funds of a client or third person could be invested to provide a positive net return to the client rests in the sound judgment of each lawyer or law firm.

[2] If a lawyer chooses to accept credit card or electronic fund transfer payments of unearned fees, paragraph (b) allows temporary deposits into the lawyers general operating account pending prompt transfer into a client trust account. This method of handling client funds avoids the direct deposit of electronic funds into a client trust account and eliminates the risk of chargebacks or transaction fees creating a negative balance in the trust account or compromising other clients trust funds. While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides the only situations in which it is allowed. Accurate records of the funds must be kept regarding which part is the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties, such as a client's creditor who has a lien on funds recovered in a personal injury action, may have lawful claims against specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims

1 against wrongful interference by the client. In such cases, when the third party
2 claim is not frivolous under applicable law, the lawyer must refuse to
3 surrender the property to the client until the claims are resolved. A lawyer
4 should not unilaterally assume to arbitrate a dispute between the client and
5 the third party, but, when there are substantial grounds for dispute as to the
6 person entitled to the funds, the lawyer may file an action to have a court
7 resolve the dispute.

8 [5] The obligations of a lawyer under this Rule are independent of those
9 arising from activity other than rendering legal services. When a lawyer holds
10 funds in a capacity other than as a lawyer representing a client, this Rule does
11 not regulate the manner in which those funds are to be held and protected.
12 For example, a lawyer who serves as an escrow agent is governed by the
13 applicable law relating to fiduciaries even though the lawyer does not render
14 legal services in the transaction.

15 [6] Guidance regarding the administration of trust accounts may be available
16 from the Interest on Lawyer Trust Account Committee of the North Dakota Bar
17 Foundation.

18 *Reference:* Minutes of the Professional Conduct Subcommittee of the
19 Attorney Standards Committee on 04/26/85 and 08/23/85; and Revised by the
20 State Bar Association of North Dakota on 08/29/86 and approved by the
21 Board of Governors on 09/06/86; Minutes of the Joint Committee on Attorney
22 Standards on 11/14/03, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08,
23 11/07/08, 12/01/08, 03/19/10, 06/15/10, 09/16/11, 12/09/11, 02/26/16,
24 11/3/20, 6/15/21.