EDUCATION

B.B.A. in Accounting in 1965
J.D. in 1968 from Southern Methodist University, where he was managing editor of the *Southwestern Law Journal* and inducted into the Order of the Coif.

PROFESSIONAL ACTIVITIES

Steve Salch has an international, federal, state and local tax, and controversy practice. A partner since 1975, and a senior partner since 1993, his practice involves all phases of state and federal planning and compliance practice, multinational tax and business practice and administrative practice.

Steve is a Past Chair of the Section of Taxation of the American Bar Association, having previously served as a Vice Chair and as a Council Director of that Section. He is a former Chair of that Section's Committee on Court Procedure.

He is the 5th Circuit Regent of the American College of Tax Counsel.
He is a member of numerous other professional organizations, including the International Fiscal Association and the American Law Institute, and is a Life Fellow of the American Bar Foundation and the Houston Bar Foundation.
He is listed in *Who's Who in America*, *Who's Who in American Law*, *Chambers USA*, and *The Best Lawyers in America*.

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

Steve is co-author of *Tax Practice Before the IRS* (Shepard's/McGraw-Hill) and is Planning Co-Chair of the ALI-ABA Course of Study, “How to Handle a Tax Case Before the IRS and in Court.”
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CONTINGENT FEES IN CIVIL TAX CONTROVERSIES: ETHICAL CONSIDERATIONS AND CONSTRAINTS

I. INTRODUCTION

Contingent fees are an issue which has come to the fore in the context of marketed refund claim programs and some “product” transactions. This Outline will not deal extensively with the issues posed by contingent fee arrangements entered into prior to the time the original return is filed by the taxpayer, save to caution the reader that there are substantial reporting and ethical issues that should be explored.

Further, the discussion in this Outline assumes the attorney is not otherwise ethically precluded from accepting the representation of the taxpayer in a post-return tax controversy context by conflict of interest or other ethical constraints. Thus, for example, this Outline does not explore the ethical question of whether or not an attorney ethically can or should represent a taxpayer in a tax controversy matter in which that attorney or a member of her firm provided transactional or return position advice which is or might become an issue. See, e.g., Tax Ct. R. Prac. & Proc. R. 24(g).

II. CONTINGENT FEES AND THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL RESPONSIBILITY.

A. Tex. Disciplinary R. Prof. Conduct R. 1.04, as amended March 1, 2005, generally permits a Texas lawyer to reach a contingent fee agreement with a client in federal tax matters, provided that the fee is not illegal or unconscionable. That Rule further provides that a fee is unconscionable if a competent lawyer could not reasonably conclude the fee is reasonable. Whether or not the fee is contingent on the results obtained is one of eight enumerated factors that may be considered in determining the reasonableness of a fee pursuant to R. 1.04(b). The Rules expressly preclude contingent fee arrangements in criminal matters. Id. R. 1.04(c).

B. Tex. Disciplinary R. Prof. Conduct R.1.04(d) further provides that a contingent fee agreement must: (1) be in writing; (2) state the method to determine the fee, including any different percentages that will apply based on the stage at which the matter is resolved; (3) and state which and how litigation and other costs are to be deducted from the recovery in calculating the fee. The Rule requires a written accounting from the lawyer to the client at the conclusion of a contingent fee matter.

III. CONTINGENT FEES AND THE AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT.

A. ABA Model R. Prof. Conduct R. 1.5 also generally permits contingent fees in federal tax matters, provided that the fee is not illegal or unconscionable. R. 1.5 does not contain a definition of “unconscionable.” However, ABA Informal Opinion 86-1521 cautions that if there is doubt about whether a contingent fee is in the client’s best interests, the client must be offered a reasonable fixed fee arrangement before entering into a contingent fee agreement. R. 1.5(a) does enumerate substantially the same eight factors, including whether or not the fee is contingent, as the Texas Disciplinary Rule.

B. ABA Model R. Prof. Conduct R. 1.5(c) also requires that a contingent fee agreement be in writing; state the method by which the fee is to be determined, including any different percentages that apply based on the stage at which resolution is achieved, and which and how litigation and other costs are to be deducted from the recovery in the fee calculation. That ABA Rule also requires that the contingent fee agreement clearly notify the client of any expense for which the client will be liable without regard to outcome. The Rule also requires a written accounting from the lawyer to the client at the conclusion of a contingent fee matter.

C. ABA Formal Opinion 93-379 (Dec. 6, 1993) precludes “doubling up” of time charges or work product billings, precludes billing overhead costs, and limits direct expense reimbursement billings to actual cost in the absence of informed client consent.

D. “Reverse contingent fees” are also permitted pursuant to ABA Formal Opinion 93-373 (Apr. 16, 1993).

E. The United States Tax Court and the United States Court of Federal Claims both adopt the ABA Model Rules as rules of conduct for attorneys admitted to practice before them. Tax Ct. R. Prac. & Proc. R. 201(a); R. USCFRC R. 83.2(c)(2). United States district courts either follow the ABA Model Rules or a combination of the ABA and State Rules. E.g., DC SDTX., LR 83.1L, App. A, R. 1.A.

A. Section 10.28 of Circular 230 long precluded practitioners from charging “unconscionable fees” for representing clients in matters before the IRS. No definition of “unconscionable” appears in Circular 230.

B. The 1993 Circular 230 Amendments added a §10.28(b) to prohibit contingent fees for preparing an original return of advising an original return position. The new provision did permit contingent fees for amended returns or refund claims (other than an original return) if the practitioner reasonably anticipates at the time the fee agreement is made that the amended return or refund claim will receive substantive review by the IRS. “Contingent fee” for this purpose includes any fee based in whole or in part of whether or not the taxpayer’s position avoids challenge or is sustained administratively or in litigation. It includes a fee based on a percentage of the refund shown or taxes saved, or that otherwise depends on the specific result obtained.

C. The 2002 Amendments to Circular 230 redesignated §10.28 as §10.27. They also amplified the definition of “contingent fee” to assure that it encompassed fee reimbursements through indemnity agreements, guarantees, rescission rights and other agreements of similar effect.

D. One significant aspect of Circular 230 is its pre-emptive effect. Sperry v. Florida, 373 U.S. 379 (1963), held that Federal, legislative regulations that prescribe who is entitled to practice before a Federal agency pre-empt state law to the limited extent necessary to accomplish federal objectives. Id., at 402.

1. The litigation under Sperry has not included Federal agencies asserting practitioner regulations that are at variance with state laws or regulations. Instead it has been between state regulatory bodies and individuals or firms and generally dealt with endeavors to preclude the latter from representing clients in matters before Federal agencies.

2. Given the more restrictive Circular 230 approach to contingent fees, it is at least possible that a United States district court in the District of Columbia could one day be called upon to review the issue in the context of an appeal from an Administrative Law Judge’s decision to uphold OPR sanctions imposed on a tax practitioner who entered into a contingent fee agreement with a client that conformed to state statutory or regulatory requirements but related to advice on an original Federal tax return.

V. APPLICATION OF THE ETHICAL NORMS.

A. A contingent fee may not be charged if:

1. it is an “unconscionable” fee either because of the amount or because of the client or other circumstances;
2. the compensated service is advice relating to a return position on the original return or preparing the original return;
3. it relates to advice relating to a refund claim position or preparing the refund claim unless the practitioner reasonably anticipates at the time the fee agreement is made that the refund claim will receive substantive review by the IRS;
4. the fee agreement is not in writing; or
5. the practitioner fails to account to the client at conclusion of the matter.

B. A contingent fee may be charged if:

1. it is reasonable in amount and in terms of the client or other circumstances;
2. the compensated service is advice relating to a position in a protest, a United States Tax Court Petition or proceeding, United States district court Complaint, or a United States Court of Federal Claims Petition;
3. it relates to a position taken in, or preparation of, a refund claim which the practitioner reasonably anticipates at the time the fee agreement is made will receive substantive review by the IRS;
4. the fee agreement is in writing; and
5. the practitioner accounts to the client at conclusion of the contingent fee matter.

C. Unconscionability involves a review of the eight factors in the ABA Model Rule and local Bar rules. The relative complexity of the issues and the sophistication of the client are important factors.

1. Unconscionability also involves a risk-reward analysis concerning the likelihood of prevailing and the client’s ability to pay a standard fee.

a. If the client is going to pay all or substantially all the costs during the pendency of the matter, what impact
does that have on the propriety and amount of a contingent fee?
b. Is there a customary contingent fee arrangement for tax matters in your area?
c. If the IRS position is known and patently incorrect, so that recovery or successful defense is as certain as any controversy issue can become, is a contingent fee appropriate? Is it appropriate at a 33% or 40% rate?
d. At what point does representation of a taxpayer preclude the lawyer from accepting other employment?
e. Is there an alternate fee basis that will yield a reasonable fee? If so, it should be presented to the client.

2. Consideration of a stairway of percentages of contingent fees based upon the status of the matter at the time it is resolved is also a major factor. However, the percentage of the total effort projected for the matter and the effort reasonably expended between the entry into the fee agreement and the resolution of the contingent fee matter is also a factor and can be a counterweight to a quick resolution at the initial level of involvement.

3. Is there a mixed fee arrangement that has a floor, perhaps a flat or discounted hourly fee, basis with a contingent “kicker” based on the results obtained and/or the point in the dispute process at which resolution is achieved?

D. If all the other ethical hurdles are passed, there seems to be no specific ethical rule that precludes accepting a post-return engagement to prepare a protest and prosecute an administrative appeal on a contingent fee basis. Note, however, that the disputed tax will not have been paid, and thus, unless the taxpayer has made a cash deposit to stop the accrual of interest there will not be a “recovery fund” from which to collect a contingent fee.

E. If all the other ethical hurdles are passed, there seems to be no specific ethical rule that precludes accepting an engagement to prepare a petition and prosecute a Tax Court case, whether the engagement is tendered before or after a statutory notice of deficiency is issued. This principle seems to hold true even if the Tax Court petition will assert a claim for refund based on an alleged overpayment. Much like the administrative phase, unless the taxpayer pays the disputed portion of the deficiency after receipt of the statutory notice of deficiency or the Tax Court petition asserts an overpayment in the original return, there will be no “recovery fund” from which to collect a contingent fee.

F. But, the same result does not seem to obtain with respect to all engagements to prepare refund claims. Pursuant to Int. Rev. Code of 1986, §7422(a) a refund claim is a jurisdictional requirement for commencement of a civil action to recover an overpayment of federal tax.

1. Circular 230 §10.27 expressly precludes contingent fee arrangements for refund claims on original returns.
2. The same section also precludes contingent fee arrangements for post-original return refund claims unless the practitioner reasonably expects, at the time the fee agreement is concluded, that the refund claim will receive substantive review by the IRS.
3. Many refund claim engagements are tendered after the IRS has formulated its position and the taxpayer has been advised to seek redress through a refund action in a district court or the Court of Federal Claims. Frequently the fastest road to the court house in such cases in which there are no new grounds or issues to be asserted in the refund claim is to request the IRS not to give the refund claim substantive review.
4. Circular 230 seems to dictate that such a practice will preclude the attorney from preparing the refund claim under a contingent fee arrangement, even though that claim will be the foundation of the subsequent refund complaint or petition filed six months or later after the claim is filed.
5. Query: If the science is in the crafting of the refund claim to overcome the variance doctrine defense by the United States, can a full contingent fee be subsequently charged for the drafting of the complaint or petition that incorporates the claim and successful prosecution of the refund action? This illustrates the issue of whether the foundation for any contingent fee arrangement in federal tax matters is or should be the art of successfully crafting and executing a dispute resolution strategy, or the science of drafting documents and pleadings. One could argue that if the matter rests largely on the science, and not the art, that a contingent fee might not be reasonable unless the client clearly lacks the ability to pay a reasonable fee on an alternative basis.
APPENDIX A

I. Texas Disciplinary Rules of Professional Conduct


CLIENT-LAWYER RELATIONSHIP

1.04 Fees (Amended March 1, 2005)

RULE: Fees (Amended March 1, 2005)

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, 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 on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the 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.

(d) 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 (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
   (1) the division is:
      (i) in proportion to the professional services performed by each lawyer; or
      (ii) made between lawyers who assume joint responsibility for the representation; and
   (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
      (i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
      (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
   (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and
   (3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (g). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:
   (1) the reasonable value of legal services provided to that person; and
   (2) the reasonable and necessary expenses actually incurred on behalf of that person.

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(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or recodifications thereof.

Comment:

1. A lawyer in good conscience should not charge or collect more than a reasonable fee, although he may charge less or no fee at all. The determination of the reasonableness of a fee, or of the range of reasonableness, can be a difficult question, and a standard of reasonableness is too vague and uncertain to be an appropriate standard in a disciplinary action. For this reason, paragraph (a) adopts, for disciplinary purposes only, a clearer standard: the lawyer is subject to discipline for an illegal fee or an unconscionable fee. Paragraph (a) defines an unconscionable fee in terms of the reasonableness of the fee but in a way to eliminate factual disputes as to the fees reasonableness. The Rules unconscionable standard, however, does not preclude use of the reasonableness standard of paragraph (b) in other settings.

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. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyers customary fee schedule is sufficient if the basis or rate of the fee is set forth. In the case of a contingent fee, a written agreement is mandatory.

Types of Fees

3. Historically lawyers have determined what fees to charge by a variety of methods. Commonly employed are percentage fees and contingent fees (which may vary in accordance with the amount at stake or recovered), hourly rates, and flat fee arrangements, or combinations thereof.

4. The determination of a proper fee requires consideration of the interests of both client and lawyer. The determination of reasonableness requires consideration of all relevant circumstances, including those stated in paragraph (b). Obviously, in a particular situation not all of the factors listed in paragraph (b) may be relevant and factors not listed could be relevant. The fees of a lawyer will vary according to many factors, including the time required, the lawyers experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained.

5. When there is a doubt whether a particular fee arrangement is consistent with the clients best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

6. Once a fee arrangement is agreed to, a lawyer should not handle the matter so as to further the lawyers financial interests to the detriment of the client. For example, a lawyer should not abuse a fee arrangement based primarily on hourly charges by using wasteful procedures.

Unconscionable Fees

7. Two principal circumstances combine to make it difficult to determine whether a particular fee is unconscionable within the disciplinary test provided by paragraph (a) of this Rule. The first is the subjectivity of a number of the factors relied on to determine the reasonableness of fees under paragraph (b). Because those factors do not permit more than an approximation of a range of fees that might be found reasonable in any given case, there is a corresponding degree of uncertainty in determining whether a given fee is unconscionable. Secondly, fee arrangements normally are made at the outset of representation, a time when many uncertainties and contingencies exist, while claims of unconscionability are made in hindsight when the contingencies have been resolved. The unconscionability standard adopts that difference in perspective and requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only. Except in very unusual situations, therefore, the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability.

8. Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is over-reaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arms length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.
Fees in Family Law Matters

9. Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Division of Fees

10. A division of fees 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 fees 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 or associating lawyer initially retained by the client and a trial specialist, but it applies in all cases in which two or more lawyers are representing a single client in the same matter, and without regard to whether litigation is involved. Paragraph (f) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes joint responsibility for the representation.

11. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d) of this Rule.

12. A division of a fee based on the proportion of services rendered by two or more lawyers contemplates that each lawyer is performing substantial legal services on behalf of the client with respect to the matter. In particular, it requires that each lawyer who participates in the fee have performed services beyond those involved in initially seeking to acquire and being engaged by the client. There must be a reasonable correlation between the amount or value of services rendered and responsibility assumed, and the share of the fee to be received. However, if each participating lawyer performs substantial legal services on behalf of the client, the agreed division should control even though the division is not directly proportional to actual work performed. If a division of fee is to be based on the proportion of services rendered, the arrangement may provide that the allocation not be made until the end of the representation. When the allocation is deferred until the end of the representation, the terms of the arrangement must include the basis by which the division will be made.

13. Joint responsibility for the representation entails ethical and perhaps financial responsibility for the representation. The ethical responsibility assumed requires that a referring or associating lawyer make reasonable efforts to assure adequacy of representation and to provide adequate client communication. Adequacy of representation requires that the referring or associating lawyer conduct a reasonable investigation of the client's legal matter and refer the matter to a lawyer whom the referring or associating lawyer reasonably believes is competent to handle it. See Rule 1.01. Adequate attorney-client communication requires that a referring or associating lawyer monitor the matter throughout the representation and ensure that the client is informed of those matters that come to that lawyer's attention and that a reasonable lawyer would believe the client should be aware. See Rule 1.03. Attending all depositions and hearings, or requiring that copies of all pleadings and correspondence be provided a referring or associating lawyer, is not necessary in order to meet the monitoring requirement proposed by this rule. These types of activities may increase the transactional costs, which ultimately the client will bear, and unless some benefit will be derived by the client, they should be avoided. The monitoring requirement is only that the referring lawyer be reasonably informed of the matter, respond to client questions, and assist the handling lawyer when necessary. Any referral or association of other counsel should be made based solely on the client's best interest.

14. In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer's fee once the matter was concluded, as was permitted under the prior version of this rule. Whether such activities, or any additional activities that a lawyer might agree to undertake, suffice to make one lawyer participating in such an arrangement responsible for the professional misconduct of another lawyer who is participating in it and, if so, to what extent, are intended to be resolved by Texas Civil Practice and Remedies Code, ch. 33, or other applicable law.

15. A client must consent in writing to the terms of the arrangement prior to the time of the association or referral proposed. For this consent to be effective, the client must have been advised of at least the key features of that arrangement. Those essential terms, which are specified in subparagraph (f)(2), are 1) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, 2) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and 3) the share of the fee that each lawyer or law firm will receive or the basis on which the division will be made if the division is based on proportion of service performed. Consent by a client or prospective client to the referral to or association of other counsel, made prior to any actual such referral or association but without knowledge of the information specified in subparagraph (f)(2), does not constitute sufficient client confirmation within the meaning of this rule. The referring or associating lawyer or any other lawyer who employs another lawyer to assist in the representation has the primary duty to ensure full disclosure and compliance with this rule.

16. Paragraph (g) facilitates the enforcement of the requirements of paragraph (f). It does so by providing that agreements that authorize an attorney either to refer a person's case to another lawyer, or to associate other counsel in the handling of a client's case, and that actually result in such a referral or association with counsel in a different law firm from the one entering into the agreement, must be confirmed by an arrangement between the person and the lawyers involved that conforms to paragraph (f). As noted there, that arrangement must be presented to and agreed to by the person before the referral or association between the lawyers involved occurs. See subparagraph (f)(2). Because paragraph (g) refers to the party whose matter is involved as a "person" rather than as a "client," it is not possible to evade its requirements by having a referring lawyer not formally enter into an
attorney-client relationship with the person involved before referring that person's matter to other counsel. Paragraph (g) does provide, however, for recovery in quantum meruit in instances where its requirements are not met. See subparagraphs (g)(1) and (g)(2).

17. What should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer's failure to comply with paragraph (g) is not resolved by these rules.

18. Subparagraph (f)(3) requires that the aggregate fee charged to clients in connection with a given matter by all of the lawyers involved meet the standards of paragraph (a) — that is, not be unconscionable. Fee Disputes and Determinations

19. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, 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, or when a class or a person is entitled to recover a reasonable attorney's fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.
APPENDIX B

ABA Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP

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 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. 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 theremittance 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 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.
APPENDIX C

31 C.F.R. § 10.27 Fees

(a) Generally. A practitioner may not charge an unconscionable fee for representing a client in a matter before the Internal Revenue Service.

(b) Contingent fees.
(1) For purposes of this section, a contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client’s fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.
(2) A practitioner may not charge a contingent fee for preparing an original tax return or for any advice rendered in connection with a position taken or to be taken on an original tax return.
(3) A contingent fee may be charged for preparation of or advice in connection with an amended tax return or a claim for refund (other than a claim for refund made on an original tax return), but only if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service.