

# THE FLAT FEE FABLE: A Cautionary Tale of a Flat Fee Fail

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## THE PROLOGUE

There are many ways that a lawyer can bill a client. Some lawyers bill by the hour, some lawyers collect a contingency fee, and some lawyers choose to accept a flat fee. Under a flat fee agreement, a lawyer accepts a specific amount of money for a specific scope of representation. For example, a lawyer may charge a client a \$500 flat fee in exchange for filing a petition to change the client's last name. Regardless of how much time it takes the lawyer to complete the task, the lawyer will only receive the agreed upon \$500.

While flat fee arrangements may be desirable to some, there are many ways that a flat fee arrangement can result in discipline. An attorney can be disciplined for placing flat fee funds into the improper bank account. An attorney can also be disciplined for having a written flat fee agreement that does not comply with the Rules of Professional Conduct.

You may be wondering – do the Rules of Professional Conduct require all flat fee agreements to be in

writing? No, flat fee agreements are not required to be in writing. However, if there is not a written agreement, the funds must be placed in a trust account – not an operating account – and held until the fees are earned.

If an attorney wishes to place flat fee funds in their operating account, the Rules require a written agreement that contains specific terms set forth in the Rules of Professional Conduct.

Without these terms, a lawyer who places flat fee funds into their operating account has violated the Rules of Professional Conduct.

In this article, we will explore the requirements for placing flat fee funds into an operating account. To begin, we review the story of Lawyer Larry – an otherwise ethical lawyer who utilizes a noncompliant flat fee agreement.

## THE FABLE

There once was a man who lived on a hill. His name was Lawyer Larry. He dabbled in this and dabbled in that. He officed in Eden Prairie.

Larry was smart – he was humble and kind. He never turned down a good case. And to his benefit, he was a charmer. You couldn't say no to his face.

One hot summer day in the middle of June, a client asked him for some help. The client was angry and upset and rude. He nearly made ol' Larry yelp.

But Larry was patient. He heard out the woes. He promised the client his best. He asked for a flat fee, up front and paid, and the issues would soon be addressed.

The agreement was signed (though missing key terms). Larry received the amount. But Larry did not place the funds into trust, they went in his operating account.

Then Larry began his lawyer duties. He completed some very good work. He fought for the client and got a big win, but Client stayed mad and berserk.

The client was upset with Larry (even though Larry, he was a star). The client in turn filed an ethics complaint with the Minnesota OLPR.

The OLPR did investigate. It found the complaint without merit. However, that flat fee agreement? Lawyer Larry had to share it.

Upon a review, the OLPR saw the agreement, it did not jive with the ethical rules and obligations under Minnesota Rule 1.5.

Despite his stellar representation, and his always ethical mission, Lawyer Larry's flat fee actions landed him a private admonition.

If Lawyer Larry had only complied with the conditions of Rule 1.5, his squeaky-clean record would still be so clean. It would live on and survive.

But now Larry knows, for the future, exactly what he must do. He must revise his flat fee agreements so he can be ethical. Woo!

Any attorney who uses flat fee agreements and places the client funds into their operating account needs to ensure they have a written flat fee agreement with each of the specific terms outlined in Rule 1.5(b)(1).

## THE LESSON

The above story, while silly, is a real depiction of what can happen in an ethics investigation. Let's imagine (without the rhymes) that an attorney receives notice that they are the subject of an ethics investigation, based on the complaint of a former client. The attorney provides the investigator with all relevant documents related to the allegations, including their flat fee agreement. Even if the allegations in the complaint completely lack merit, the attorney might still be disciplined for issues related to their flat fee agreement if it does not contain the required language from Rule 1.5(b)(1).

What is the lesson here? Any attorney who uses flat fee agreements and places the client funds into their operating account needs to ensure they have a written flat fee agreement with each of the specific terms outlined in Rule 1.5(b)(1).

In Minnesota, the five necessary terms are: (1) the nature and scope of the services to be provided; (2) the total amount of the fee and the terms of payment; (3) that the fee will not be held in a trust account until it is earned; (4) that the client has the right to terminate the client-lawyer relationship; and (5) that the client will be entitled to a refund of all or a portion of the fee if the

agreed-upon legal services are not provided.

Lawyer Larry learned the hard way that having a noncompliant flat fee agreement can result in attorney discipline. Take a moment to learn from his mistake and ensure your flat fee agreements comply with the Rules of Professional Conduct. If any questions arise, it is best to consult with a seasoned ethics attorney to ensure compliance with the Rules.

As the well-known saying goes, "fix your flat fee agreements before you find yourself the subject of a legal ethics poem." And if that is not a well-known saying, it certainly should be.

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