Fee Simple.

Ethics, Money and the Reasonable Lawyer

Students of human history can glean valuable information about any society's morality and standards by looking at its rules and laws. To learn about relations and interactions between the citizens - between husband and wife, seller and buyer, owner and renter, borrower and lender, healer and patient, student and teacher, master and servant – we need only consider the "thou shalts" and "thou shalt nots" of the day. From those, a picture of life then and there will emerge.

For example, we might like to know more about Moses and the Exodus from Egypt. Eyewitnesses to the parting are rare these days, and written histories from that era are equally scarce. Even the best accounts are from sources that were remote in time and place even then. Most of the world was illiterate. Graven images were forbidden and destroyed. With such a scant record, we have very limited sources of information about the Exodus and the forty years in the desert. Science has confirmed, however, that the Israelites lived on Manna from heaven, and it is generally accepted that somehow they got water while wandering around Sinai. Impressive.

But we know a bit more, too. We know about their ethics. We know how they defined right and wrong, and we know that they had both in their midst. We know that there were Israelites practicing polytheism, taking the Lord's name in vain, committing adultery, killing each other, dishonoring their parents and the Sabbath, coveting their neighbor's wives and donkeys, bearing false witness against their neighbors, and so on. We deduce this from their laws, which, incidentally, were written in stone. By further deduction, we know they had neighbors, wives and donkeys.

When future anthropologists and sociologists study twenty-first century America, wanting to know what we were "about," a copy of the U.S. Constitution would be illuminating for them. So would your dog-eared first edition of the 2015 Rules of Court, annotated. Where better to learn about courts and judges and lawyers or the interplay between our government and the people it is by and for? After reading the Rules, astute scholars might discern such dichotomies as public and private law, civil and criminal law, juvenile and adult law, federal and state law, and more. Even a dull observer would note how complex our juristocracy was, and how essential to our civilization were our lawyers.

Equally helpful to this future study might be perusal of our Rules of Professional Conduct, the Supreme Court's proclamation of dos and don'ts for lawyers. Aided by the RPCs, future social scientists will gain insight into the relations between our lawyers and their clients, between lawyers and other lawyers, lawyers and the courts, and lawyers and the truth.

They will see that by 2015, law had evolved from a discipline into a profession into an industry. Lawyers were professionals who depended on others to pay them for plying their trade – excuse me - profession. Lawyers came to be lawyers for many reasons, but their clients come to them for many more. In twenty-first century America, lawyers were the means of accessing and navigating a sophisticated legal system and a fluid, amorphous business universe.

Consequently, in the markets where they traded, twenty-first century lawyers had great leverage. They were able to charge a lot for their services, and they did. Since money was both the fuel and the grease in that society's machinery, disputes between lawyers and their clients were usually money-based. Disputes between lawyers and other lawyers were not uncommon. Headlines about legal fees made baseball salaries envious. Guidelines were needed; rules arose in response.

"A lawyer's fee shall be reasonable," begins RPC 1.5, aptly entitled, "Fees." Those future researchers might wonder why lawyers, of all people, needed to be reminded – no, mandated - that their fees had to be reasonable. Lawyers, you would think, should have little problem understanding the concept.

After all, our entire system of jurisprudence is based on reasonableness. Our laws presuppose that most members of our society share a similar, albeit not identical, notion of what is reasonable. For example, we expect all parties to a contract to know what is meant by reasonable behavior or a reasonable delay or a reasonable opportunity to cure. We assume that jurors will understand reasonable foreseeability, and that they will recognize a reasonable doubt.

There has never been consensus as to what a reasonable fee is, but, as a guideline, our fees must be reasonable as to both nature and amount. RPC 1.5 offers some factors we may consider when trying to set a reasonable fee.

There are many reasonable ways to structure a fee. Contingent fees are generally allowed, though forbidden in certain types of matters such as criminal defense and divorce, and disfavored in others such as probate. Furthermore, we cannot *insist* to be employed on that basis; we must provide an alternative and educate the client about the choice. Moreover, in all cases, contingent fee agreements must be in writing, and in some cases, they still require approval by the court, based on the reasonableness of the fee, of course.

Besides the "continge," there are many other permissible arrangements. Professor Kevin H. Michels, in his seminal *New Jersey Attorney Ethics,* offers an ample sampling. "A fee may be based on the reasonable value of services rendered. It may be a fixed fee, i.e., a predetermined amount to cover the complete representation or to cover each portion of a multi-part representation. An attorney and client may agree on an hourly fee, on a capped hourly fee, discounted hourly fee…,a fixed fee coupled with a predetermined bonus for the achievement of certain results, modified contingency fees,…or a negative contingency fee (defense counsel fees dependent on outcome)…" Apparently, they can all be reasonable.

Fees are not simple. In addition to the reasonableness of our fee *arrangement*, the *amount* we charge must be also reasonable. This requirement has ruptured many relationships between counsel and client and has spawned many lawsuits and fee arbitrations. No one understands it.

RPC 1.5 lists several factors we may consider in determining the reasonableness of a fee. Most lawyers are familiar with them. For example, we may consider the lawyer's skill and experience. Presumably, attorneys with great experience can ethically command a higher fee than their unseasoned colleagues. This satisfies an intuitive logic of ours, but I arrive at the opposite conclusion.

Why shouldn't inexperienced, untested attorneys charge more than their experienced colleagues for the same work? Consider how much harder lawyering is when you are new at it. Just look at the time and effort we devote to preparation the first time we argue a motion or try a case. Wouldn't it be reasonable for the neophyte to charge more?

Attorneys' fees may also reflect the quality of the result achieved for the client. Sounds reasonable, no? Good result equals happy client; happy client will pay more. But weren't performance incentives such as this behind the use of steroids in professional sports? Besides, when we lose, don't we work just as hard as the side that won? And which person's point of view will determine whether the result was a good one: the experienced lawyer who knew all along what the case was worth, or the disgruntled client who was hoping for celestial pie? What would be reasonable?

Look all around for evidence of reasonableness. Do doctors give discounts when the patient dies? Do builders get a bonus because the house withstood a storm? Do you get a break at the restaurant when the soup is too salty or pay more when they get it just right? Wouldn't that be reasonable?

Wouldn't it be reasonable for lawyers to charge wealthy clients more than poor ones for the same service, even asking the well-heeled client for double the usual fee, in order to do a freebie for an indigent, or tripling the reasonable fee to help two indigents?

A lawyer's fee may reasonably reflect our specialized knowledge and experience, but would it be unreasonable to factor in some client attributes, too? Consider the foul-breathed client that annoys your assistant, or the impatient client who waits three days to return your calls. Can't we charge them a premium for putting up with them? Can't we bill clients at a higher rate when we they ignore our advice, or charge more for a court appearance when they fail to appear? It all seems so reasonable.

I had been hoping that this column would shed some light for attorneys on the subject of our fees, or at least on the subject of reasonableness. Instead, I muddied the waters trying to understand what is a reasonable fee. After some reflection, I feel comfortable with this advice to attorneys looking for guidance from the Rules: When setting a fee, don't worry about being reasonable under the RPCs – no one knows what that means. Just be fair.

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