

Kentucky Bar Association
Ethics Opinion KBA E-380
Issued: June 1995

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, amended Rule 1.5(f) and Comment 11 specifically address non-refundable retainers. Lawyers should consult the current version of the rules and comments, SCR 3.130, (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: May a retainer fee be designated as “non-refundable?”

Answer: Yes.

Question 2: Is the lawyer’s designation of a payment as “non-refundable” conclusive as to “reasonableness” of the fee?

Answer: No.

Question 3: What are the crucial elements of a valid “non-refundable” retainer agreement?

Answer: See Opinion

Question 4: If the lawyer obtains an advance fee payment, and the arrangement is not a valid “non-refundable” retainer agreement, must the funds be held in the lawyer’s trust account?

Answer: Yes.

References: Rules 1.5, 1.15 and 1.16; Charles Wolfram, Modern Legal Ethics (St. Paul: West, 1986), pp. 178-179, 505-506; In Re: Cooperman, 633 N.E.2d 1069 (N.Y. 1994); McKenzie Const., Inc. v. Maynard, 758 F.2d 97 (3rd Cir. 1985). Alaska Op. 87-1; Pennsylvania Op. 85-120; Utah Op. 136; Wisconsin Op. E-93-4.

OPINION

In response to numerous requests for advice regarding “non-refundable” retainer fee arrangements, the Committee provides the following guidance.

Traditionally, a true RETAINER is a payment made by the Client to secure the lawyer’s or law firm’s availability “to handle the client’s legal problems during the period of time ... but [the client] has no expectation that the fee already paid will cover specific items ... It is quite common for the initial payment to be supplemented by an hourly charge [that may or may not be

less than the lawyer's normal hourly charge].” Wolfram at p. 506. A retainer, like any other payment, must be reasonable, judged in light of the factors enumerated in Rule 1.5(a). The lawyer who receives a RETAINER has earned the fee by promising to be available for future work, and the funds so received need not be put in a trust account. See Baranowski v. State Bar, 154 Cal. Repr. 752, 593 P.2d 613 (cal. 1979).

A RETAINER, as described above, is to be distinguished from an ADVANCE FEE PAYMENT, which some lawyers call “retainers.” The client’s expectation is that the lawyer will perform the particular services requested and draw on the prepaid fees as services are rendered and then considered earned according to some previously established basis, usually the lawyer’s hourly rate. If any of the prepayment were left at the close of the representation, it would be refunded to the client pursuant to Rule 1.15 and 1.16(d).

Lawyers may designate some amount of a client’s written fee payment for a particular case or matter as a “NON-REFUNDABLE RETAINER” with the intention to make it clear to the client that a portion of the fee is earned at the time of payment and commencement of the representation, and that if the client discharges the lawyer, this advanced fee payment will not be returned. For example, a lawyer may agree to represent a client in a divorce case and require the payment of a “non-refundable retainer” as there is initial work and responsibility assumed in the process of accepting the matter and defining client rights. Moreover, the client, when establishing the lawyer - client relationship intentionally creates a conflict of interest that would preclude representation of the other spouse. Some clients are irresolute - indeed, some would flit from lawyer to lawyer. The non-refundable retainer secures an appropriate degree of commitment from the client and ensures that the lawyer will be compensated for time and responsibility invested and for the risk assumed in the early stages of a matter.

The Committee acknowledges that the practice of accepting “non-refundable retainers” has been rejected by some courts, disciplinary counsel, and commentators, on the grounds that (1) all fees must be “reasonable” under Rule 1.5(a), and a non-refundable retainer deprives a client of the right to receive a refund on the unearned portion of a previously collected fee, and (2) that such arrangements “chill” the client’s “absolute right” to discharge counsel. See, e.g., In re: Cooperman, 633 N.E.2d 1069 (N.Y. 1994) aff’d, 591 N.Y.S.2d 855 (N.Y. App. div. 1993); Brickman & Cunningham, Non-refundable Retainers Revisited, 72 N.C.L. Rev. 1 (1993). The Cooperman court took the position that the taking of a “non-refundable retainer” is a per se violation of the Rules of Professional Conduct and rejected the argument that such arrangements are a violation only if they are pegged to an “unreasonable fee.” We disagree with this analysis.

Rule 1.5(a) requires that lawyers’ fees be “reasonable” and an examination of what is “reasonable” is not insulated from review simply because it has been labeled “non-refundable” in the written fee agreement. Wolfram, in his text, Modern Legal Ethics, gives the following example: “A client who has just paid a lawyer \$50,000 to perform all occupational health and safety work for a factory that burns down the next day, obviating the need for any legal work, can probably recover the retainer even if it was solemnly called “non-refundable” in the agreement.”

In determining the “reasonableness” of a lawyer’s fee, the factors mentioned in Rule 1.5(a) apply, and the lawyer has the responsibility to prove the “reasonableness” of the fee applying principles of equity and fairness. Although “reasonableness” at the time of contracting is relevant, consideration is also to be given to whether events occurred after the fee agreement was made which rendered the fee agreement fair at the time it was entered into, but unfair at the time of enforcement. *See McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985). Hence, the client may be entitled to a return of some portion of the “non-refundable” fee retainer upon the termination of the representation, depending upon all the circumstances; that is, the “reasonableness” of the fee.

Accepting representation often precludes a lawyer from taking on other matters, at present and in the future, and the employment of a lawyer may confer immediate benefits on the client. We also note that the client does not have an absolute right to discharge counsel, rather, the client has the absolute power to do so. The lawyer-client arrangement is a contractual arrangement, and while the lawyer has obligations, the lawyer also has rights. The client who discharges a lawyer has an obligation to the lawyer for the payment of “reasonable” compensation. The question in every case is whether the compensation claimed is “reasonable” under the terms of the agreement and under the circumstances.

We agree with those authorities who hold that a “reasonable” fee may be made “non-refundable” and deposited into the lawyer’s general office account as any other earned fee. Accordingly, we find that in order for a non-refundable fee retainer to be valid the arrangement must meet the following criteria:

1. The arrangement must be fully explained to the client, orally, and in a written fee agreement that is signed by the client;
2. The arrangement must specify the dollar amount of the retainer, and its application of the scope of the representation, and/or the time frame in which the agreement will exist; and
3. The total fee to be charged must be “reasonable.”

See Alaska Op. 87-1; Pennsylvania Op. 85-120; Utah Op. 136 (1993); Wisconsin Op. E-93-4.

The Committee finds that a “non-refundable retainer” is not prohibited by Rule 1.5, is not necessarily unearned in all cases, and is not “unreasonable” as a matter of law. A declaration that all non-refundable fee retainer agreements are unethical and are in violation of the Rules of Professional Conduct is an over-simplistic approach and is not derived from any fair reading of the text of Rule 1.5.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.