

KENTUCKY LAW UPDATE



2024

ADVANCING THE PROFESSION THROUGH EDUCATION

Fee Agreements: Non-refundable Is Not a Thing

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**Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education
for
Kentucky Bar Association
2024 Kentucky Law Update**

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Published and Printed by:
Kentucky Bar Association, August 2024**

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FEE AGREEMENTS: NON-REFUNDABLE IS NOT A THING

Robbie O. Clements

“I told him it was a non-refundable fee...”

“It was non-refundable, so I deposited it directly into my operating account.”

“No, I didn’t refund anything. It was a nonrefundable fee.”

“I know it’s not technically correct, but it’s what we all do.”

The mistaken belief that an attorney fee can be non-refundable in Kentucky continues to stubbornly persist. Fortunately, compliance with the Rules on this subject is not difficult.

I. PRACTICE POINT: WHEN MONEY COMES INTO AN ATTORNEY’S HANDS, IT IS EITHER AN EARNED FEE OR AN UNEARNED FEE

If the attorney is being paid for services that have already been performed, meaning the work has been completed, then the fee is considered an earned fee. Earned fees must be deposited directly into the attorney’s operating account.

Unearned fees, on the other hand, must be deposited into the attorney’s client trust account, along with advanced costs. Until the attorney completes services to earn that fee, or expends the money on costs, the money belongs to the client, not the attorney. Because the money belongs to the client, [SCR 3.130\(1.15\)\(a\)](#) requires such funds to be safeguarded by the attorney in the attorney’s trust account, separate from the attorney’s own funds. The attorney must keep track of such client funds using generally accepted accounting practices, and Comment 1 to [Rule 1.15](#) recommends following the ABA Model Financial Recordkeeping Rule. The only exception to the requirement that unearned fees be deposited in a trust account is spelled out in [SCR 3.130\(1.5\)\(f\)](#). If the attorney and client enter into a proper advance fee agreement, then the fee, though unearned, must be deposited to the operating account.

II. PRACTICE POINT: NO FEE IS EVER NON-REFUNDABLE

[SCR 3.130\(1.5\)\(f\)](#) states: “A fee may be designated as an advance fee.” Even the rule itself no longer uses the word “non-refundable.” Because that was never what it meant. The non-refundable designation was changed in 2020 to more accurately reflect the character of the fee. No unearned fee paid in advance is ever “non-refundable.” Stated simply, reasonableness cannot be contracted away. This has been clear since the first ethics opinion on the topic, [KBA E-380](#), was issued in June 1995.

[KBA E-380](#) distinguishes between a “retainer,” which is paid to secure the lawyer’s promise to be available for nonspecific future work, and an “advance fee,” which is paid to ensure the lawyer’s performance of particular services. [KBA E-380](#) states 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.” However, it specifically states that in determining the reasonableness of such a fee, consideration must 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.” The opinion

specifically said, "...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..."

After [KBA E-380](#) was issued, the Supreme Court added language to [SCR 3.130\(1.5\)](#) stating in subsection f: "A fee may be designated as a non-refundable retainer. A non-refundable retainer fee agreement shall be in a writing signed by the client evidencing the client's informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist." Comment 11 stated, "A lawyer may designate a fee arrangement as a non-refundable retainer and upon receipt deposit such funds in the lawyer's operating account. The amount of a non-refundable retainer fee must be reasonable in amount and comply with [Rule 1.5](#)."

III. PRACTICE POINT: NO FEE AGREEMENT SHOULD CONTAIN "NON-REFUNDABLE"

As the comments and the case law make clear, no fee is ever non-refundable. The only thing such a fee agreement does is make it permissible to deposit an unearned fee to the operating account. To clarify the misconception, the Court amended [Rule 1.5](#), replacing "non-refundable retainer" with "advance fee" and "retainer" with "fee." Based on the language of [KBA E-380](#), then, such an agreement relates to advance payment for performance of specific services. In addition to replacing "non-refundable retainer" with "advance fee," Comment 11 was further amended to clearly state, "In the event the full amount is not ultimately earned, or due to other factors, such as termination of the attorney-client relationship or is not reasonable, the funds must be returned to the client as provided in [Rule 1.16\(d\)](#)." Simply stated, banish the term "non-refundable" from your fee agreements and your vocabulary.

IV. PRACTICE POINT: VIOLATING [RULE 1.15](#) FREQUENTLY RESULTS IN PUBLIC REPRIMAND

Alerding v. Kentucky Bar Association, 671 S.W.3d 137 (Ky. 2023): Alerding was hired in connection with a murder indictment and quoted a \$10,000 fee, of which he had been paid \$9,800. He did not have a written fee agreement. Without authorization to do so, he deposited the funds directly into his operating account. Alerding admitted the conduct and that it violated [SCR 3.130\(1.15\)\(e\)](#). He received a public reprimand.

Stanziano-Sparks v. Kentucky Bar Association, 552 S.W.3d 507 (Ky. 2018): Stanziano-Sparks was paid \$2,500 to represent a client in a custody matter and deposited the unearned fee directly into her operating account. Stanziano-Sparks was charged with violating [SCR 3.130\(1.15\)\(a\)](#) for her failure to deposit the unearned fee into her trust account, in addition to charges for violating [SCR 3.130\(1.3\)](#), [\(1.4\)\(a\)](#), and [\(1.16\)\(d\)](#). She received a public reprimand conditioned on her attendance at EPEP and refund of the unearned fee.

Snyder v. Kentucky Bar Ass'n, 437 S.W.3d 141 (Ky. 2014): Snyder collected \$7,961 from a client on a bankruptcy matter, followed by two additional \$5,000 payments. None of those fees were deposited into a trust account. Snyder also admitted he had not even maintained a trust account at all for the previous five years, so for that period, all client funds were going into either his personal or operating account. Snyder was charged with violating [SCR 3.130\(1.15\)\(a\) and \(e\)](#), and also [SCR 3.130\(3.4\)\(c\)](#) for collecting fees not

approved by the bankruptcy court, and received a public reprimand conditioned upon continued KYLAP monitoring.

Keen v. Kentucky Bar Ass'n, 386 S.W.3d 737 (Ky. 2012): In the first of two consolidated matters, Keen was paid \$2,000 by a client for representation in a child custody matter. The money was deposited directly into his operating account. Keen filed no pleadings and was ultimately terminated. When the bar complaint was filed, he also failed to respond. In the second case, Keen received \$500 to represent a client in a child support matter, which was also deposited directly into his operating account. The client was then unable to contact Keen. Keen did ultimately complete the representation after the bar complaint was filed. In these matters, Keen was charged with two counts each of violating [SCR 3.130\(1.3\)](#) (diligence); [\(1.4\)\(a\)\(4\)](#) (communication); and [\(1.15\)\(a\)](#) (failure to deposit unearned fees into an escrow account), along with one count of violating [SCR 3.130\(8.1\)\(b\)](#). Keen received a public reprimand and was further required to attend EPEP and refund any unearned fee if he had not done so.

Kentucky Bar Ass'n v. Bubenzer, 145 S.W.3d 842 (Ky. 2004): Bubenzer did not deposit a \$4,000 retainer into a trust account and instead deposited it into his general operating account. In addition, when the client terminated the attorney/client relationship, he did not refund the unearned portion of the retainer. Bubenzer was found guilty of violating [SCR 3.130\(1.15\)\(a\)](#) and [SCR 3.130\(1.16\)\(d\)](#) and received a public reprimand.

V. PRACTICE POINT: “EARNED ON RECEIPT” IS ALSO NOT A THING

Kentucky Bar Ass'n v. Earhart, 360 S.W.3d 241 (Ky. 2012): In this reciprocal discipline matter, Earhart had received a 30-day suspension in Indiana after having been paid \$10,000 to represent a client against whom criminal charges were anticipated. His letter referred to it as a “non-refundable retainer.” Unfortunately, the client killed himself a few days later, and Earhart had performed no more than five hours of work. Nevertheless, Earhart had refused any refund. Earhart asserted the fee was a classic retainer, and as such would be earned on receipt per [KBA E-380](#). The Indiana Supreme Court had concluded, “Regardless of the label or actual nature of an attorney’s fee, the attorney must refund any part of it that is unearned... In the circumstances of this particular case, the client’s death soon after retaining Respondent clearly rendered at least a portion of the client’s \$10,000 payment unearned.” The Kentucky Supreme Court agreed, concluding that, “under the facts of this case as established by the Indiana Supreme Court, [Earhart’s] fee could not be considered reasonable.”

VI. CONCLUSION: REMEMBER – YOU CAN’T CONTRACT AWAY THE REASONABLENESS OF A FEE

[SCR 3.130\(1.5\)\(a\)](#) prohibits lawyers from making “an agreement for, charg[ing], or collect[ing] an unreasonable fee...” This central tenet cannot be contracted away. No fee is “non-refundable.” No fee is “earned on receipt.” Even with a properly executed advance fee agreement under [Rule 1.5\(f\)](#), attorneys must complete the work to earn the fee, so tracking time remains important, in the event the representation ends before the full fee is earned.

FOR YOUR INFORMATION ...

The Kentucky Law Update: Continuing Legal Education for All Kentucky Lawyers

The Supreme Court of Kentucky established the Kentucky Law Update Program as an element of the minimum continuing legal education system adopted by Kentucky attorneys in 1984. The KLU program is now offered in a hybrid format. The 2024 Kentucky Law Update is offered as a one-day, in-person program at nine different locations across the state. The 2024 On-Demand Kentucky Law Update is offered virtually on the Kentucky Bar Association website from September 1st until December 31st. These two programs offer every Kentucky attorney the opportunity to meet the 12 credit CLE requirement, including the 2 ethics credit requirement, **close to home and at no cost!** Judges can also earn continuing judicial education credits at the Kentucky Law Update.

This program was designed as a service to all Kentucky attorneys regardless of level of experience. This service is supported by membership dues and is, therefore, each member's program. The program is a survey of current issues, court decisions, ethical opinions, legislative and rule changes, and other legal topics of general interest that are faced by the Kentucky practitioner on a daily basis. As such, the program serves both the general practitioner and the practitioner who limits his or her practice to a particular field of the law. The Kentucky Law Update program is not intended, nor designed, to be an in-depth analysis of a particular topic. It is designed to alert the lawyers of Kentucky to changes in the law and rules of practice that impact the daily practice of law.

About the Handbooks and Presentations

Handbook materials are the result of the combined efforts of numerous dedicated professionals from around Kentucky and elsewhere. The KBA gratefully acknowledges the following individuals who graciously contributed to this publication:

Nicole S. Bearse	Stephen Embry	Bruce Simpson
Robbie O. Clements	Yvette Hourigan	Rebecca Adams Simpson
Don H. Combs, III	James K. Murphy	Jordyn Smith
Larry C. Deener	Mary Ellis Patton	Henry L. Stephens, Jr.
Laura Day DelCotto	Damon Preston	Robert P. Stith
Haley Dennis	Shari Polur	Eleanore Stoess
Sean Dennis	Lou Anna Red Corn	Judge Thomas Lee Travis
Laurel S. Doheny	Lori J. Reed	B. Scott West
Angela Logan Edwards	Jeffery L. Sallee	

Special Acknowledgments

Special thanks to the following KBA Sections, Committees, and other organizations whose participation and assistance with the 2024 Kentucky Law Update programs have been invaluable:

KBA AI Task Force	KBA Office of Bar Counsel
KBA Alternative Dispute Resolution Section	KBA Well Being Committee
KBA Criminal Law Section	Kentucky Court of Appeals
KBA Elder Law Section	Kentucky Lawyer Assistance Program
KBA Ethics Committee	Lawyers Mutual of Kentucky
KBA Family Law Section	Legislative Research Commission
KBA Law Practice Committee	NAELA – Kentucky Chapter
KBA Military Law Committee	Supreme Court of Kentucky

Presentations are also made on a voluntary basis. To the individuals who volunteer in this capacity, special gratitude is owed. Individuals contributing to this program are contributing to the professional development of all members of the Kentucky Bar Association. We wish to express our gratitude in advance to these individuals.

A special thank you to all of the organizations, authors, presenters, moderators, and other 2024 Kentucky Law Update program volunteers will appear in the January 2025 issue of the *Bench & Bar*.

CLE and Ethics Credit

The one-day, in-person 2024 Kentucky Law Update Program is accredited for 7 CLE credits, including 2 ethics credits. The 2024 On-Demand Kentucky Law Update is accredited for 7.75 CLE credits, including 3 ethics credits. One credit is awarded for each 60 minutes of actual instruction as noted on the agendas provided on the KBA website.

The Kentucky Bar Association 2024 Kentucky Law Update programs are accredited CLE activities in numerous other jurisdictions. Credit categories and credit calculations vary from state-to-state. CLE reporting information for other states will be provided at the registration desk at the in-person programs. The out of state information for the on-demand sessions will be available on the program website.

Kentucky Judges, don't forget you can claim CJE credit for attending this program.

REMEMBER! Reporting attendance credits is now online. Reporting information and activity numbers will be available at each respective in-person event. The on-demand reporting information and activity number will be located on the program website.

Evaluations

The 2024 Kentucky Law Update is *your* program and your input *is* valued and needed. Links to the program evaluations for the live, in-person programs and the on-demand program will be provided to all registrants via email. PLEASE take a few minutes to complete the evaluation questionnaire upon receipt. We appreciate your assistance in improving this service.

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