Nonrefundable Retainers & Other Oxymorons

A lawyer’s fee may be fixed or based on time charges; it may be paid in advance; or billed as earned. However, an unearned fee, if paid in advance, must be held in a trust account until earned, and must be refunded upon termination of the representation. Calling an unearned fee nonrefundable does not make it so.

These seem straightforward propositions, supported by ethics rules and a growing number of rulings and opinions. However, a number of lawyers continue to stretch the rules by attempting to retain unearned fees. Disciplinary authorities have responded by disciplining and enforcing the rules.

Rule 1.5(b) of the Minnesota Rules of Professional Conduct addresses “agreements for the advance payment of nonrefundable fees to secure a lawyer’s availability for a specific period of time or a specific service.” Such fees are sometimes called engagement fees or general retainers. They are “paid, apart from any other compensation, in advance of the commencement of legal services to be performed for a client in contemplation or for an actual employment of the lawyer’s services.”

A client might anticipate needing legal services in the future and wish to ensure the lawyer’s availability at the time. In effect, “taking an option” on the lawyer’s services.

The attorney, by committing to an engagement agreement, may forego other opportunities for representation of clients, because of time commitments or conflicts of interest. Under such circumstances, the lawyer may treat a reasonable engagement fee as earned upon receipt. Such engagement fees must be reasonable in amount. An engagement fee satisfies this requirement “if it bears a reasonable relationship to the income the lawyer is expected to receive from the client (or competitors), such as an amount sufficient to cover the reasonable costs of services to be provided.”

Upon termination of an engagement, a lawyer is required to refund any advance payments of fees or expenses that have not been earned or incurred. It is contrary to public policy to permit a lawyer to treat a nonrefundable retainer as advance payment for legal services to be performed (as opposed to an engagement fee), because it compromises the client’s ability to discharge the lawyer, and sue other counsel to complete the representation, thereby holding the lawyer hostage to an unearned fiduciary relationship.

A lawyer is required to “deposit all fees in advance of the legal services being performed into a trust account and withdraw the fees as earned.” The rule excludes only availability retainers. A lump sum fee is paid in advance of services to be performed at a future time and withdrawn as earned. Fees paid in advance for services to be performed at a future time are sometimes referred to as engagement fees or engagement retainers. Lump sum fees are sometimes referred to as fixed fees or minimum fees. Regardless of terminology, they are not engagement fees and are treated differently.

Upon termination of an engagement, a lawyer is required to refund to the client “any advance payment of fees or expenses that has not been earned or incurred.” This obligation to refund unearned fees is not dependent upon the circumstances of termination, and applies whether the lawyer fails to perform the agreed services or the lawyer is discharged.

A client is entitled to discharge a lawyer at any time, with or without cause. The discharged lawyer is not entitled to contracted compensation or fees for services not rendered.

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The Minnesota Supreme Court has held that such refunds are not due to adverse circumstances or to performance of services, but merely to reflect the real value of services rendered. Thus, if a lawyer is discharged for any reason, the lawyer is required to refund to the client any advance payment of fees or expenses that has not been earned or incurred. This obligation to refund unearned fees is not dependent upon the circumstances of termination, and applies whether the lawyer fails to perform the agreed services or the lawyer is discharged.

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In Minnesota, the issue may have been closed for a time by interpretations of the ruling in In re Lechow, supra n. 3, in that case the Supreme Court held that "accuracy fees for payment of services to be performed in the future" must be included in a trust account. An exception was recognized for availability retirement, reasonable in amount, which "could be immediately earned if the return were stipulated and approved in writing by the client. This holding was incorporated in Opinion No. 15, adopted by the Lawyers Professional Responsibility Board on September 13, 1991. It defined "availability or Nonrefundable Retainer" as "Funds paid by a client or a prospective client to secure a lawyer's general availability so, or representations to that effect over a specified period or time or for a specific legal matter," and agreed that such retainers are not required to be deposited into a trust account or held in trust," provided a written retainer agreement is signed by the client, with a specific disclosure above the signature that the funds will not be held in trust and may not be returned if the client terminates the lawyer's services. This opinion could have been read as permitting a lawyer, with the required disclosures and signature, to collect an advance fee payment for a service without obligation to hold it in trust. This opinion was reapplied Jan. 26, 2006. Some of its provisions were incorporated in Rules 1.15(d) and 1.15(e), Minn. R. Prof. Conduct.

Those rules now require a lawyer to deposit all advance fees into a trust account, except those paid pursuant to an availability retainer. Perhaps encouraged by the language of Lechow and Opinion 15, some lawyers have collected advance fees for legal services to be performed, treating the fees as nonrefundable and not holding them in trust. Discipline has not yet been imposed for treating an advance fee payment as nonrefundable, although lawyers have been disciplined for failing to communicate the fees in a written signed by the client and for failing to deposit unearned fees in a trust account. The Office of Lawyers Professional Responsibility has previously expressed its interpretation of the rule,5 and intends to continue educational efforts. Consideration may be given to seeking a formal opinion of the Lawyers Board, and discipline may be sought for egregious violations of the rule.

Notes

Reinart, Third, The Law Governing Lawyers, sec. 34, Comment (e).


In re Lechow, 469 N.W.2d 91, 98 (Minn. 1991).

Minn. R. Prof. Conduct, Rule 1.15(b).

Reinart, Third, The Law Governing Lawyers, sec. 34, Comment (e).

Minn. R. Prof. Conduct, Rule 1.15(b). These and contingent fees are the only kinds of fees that the Rules require be included in a written signed by the client.

Rule 1.15(c)(5), Minn. R. Prof. Conduct, requires that fees paid in advance of performing services be deposited in trust and withdrawn as earned "unless the lawyer and the client have written a written agreement pursuant to Rule 1.15(b)."

Reinart, Third, The Law Governing Lawyers, sec. 34, Comment (e).

Rule 1.16(d), Minn. R. Prof. Conduct; see Rule 1.5, Comment 4 ("A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.")

Lander v. Dunl. 145 Minn. 281, 170 N.W. 989 (1920); accord, Norville v. NSF, 478 N.W.2d 498 (Minn. 1991); Michaelson v. 3M, 474 N.W.2d 174 (Minn. Apr. 1991).


Rule 1.15, Minn. R. Prof. Conduct.

Rule 1.15(5)(d), Minn. R. Prof. Conduct.


Washington Rev. Ctr. 15. See also Chapter 45, Iowa Court Rules.


See P. Batters, "Nonrefundable retainers — when are they inappropriate?" Minne. Lawyers (May 7, 2002).

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Lawyers with questions about these and other matters may consult the Advisory Opinion Service of the Office of Lawyers Professional Responsibility. Advisory opinions may be obtained by telephone (651) 296-3922 or toll-free 1-800-657-3620 or via an email link on the Office website: http://www.mnbar.org/ethicalforms/OService.asp. ▲

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