

Nonrefundable retainers — when are they appropriate?

by

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The practice of lawyers in Minnesota charging clients nonrefundable retainers has become widespread, perhaps too much so.

Many lawyers, for reasons not generally accepted as justifying such a retainer — avoiding the need to maintain a trust account or improving cash flow — appear to be requiring the payment of nonrefundable retainers in virtually every representation undertaken.

Rule 1.5(b) of the Minnesota Rules of Professional Conduct provides that “All agreements for the advance payment of nonrefundable fees *to secure a lawyer’s availability for a specific period of time or a specific service* shall be reasonable in amount and clearly communicated in a writing signed by the client.” (Emphasis supplied.)

Prior to 1991, Minnesota law was less than clear as to whether a nonrefundable retainer was permissible. In *In re Lochow*, 469 N.W.2d 91, 98 (Minn. 1991), the Minnesota Supreme Court acknowledged that under certain circumstances the charging of a nonrefundable retainer may be appropriate. “We are fully aware that there may be cases when the client’s desire to have a particular attorney represent him or her will necessitate an immediate commitment,” the court wrote. “That attorney will possibly have to forego representation of other clients and might lose other business while the attorney commits him or herself to the client now seeking representation. Such a retainer fee, if reasonable, may be immediately earned.”

It seems that the *Lochow* court, in referring to retainer fees paid to ensure the availability of counsel, was authorizing what is sometimes called a general retainer, as opposed to a special retainer, which is a fee paid to a lawyer in exchange for specified services to be performed by the lawyer.

The view that general or availability retainers are appropriate only under certain limited circumstances is one shared by most authorities. Comment (e), “Restatement Third, The Law Governing Lawyers,” sec. 34, discusses retainers that are considered earned upon receipt. The Restatement calls such retainers “engagement retainer fees.” The comment states:

As used in this Restatement, an “engagement retainer fee” is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer’s service in a matter and from an advance payment from which fees will

be subtracted. A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any performed.

An engagement retainer fee satisfies the requirements of this Section [that a lawyer's fee be reasonable] if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client's matter, keeping up with the relevant field, and the like.

Similarly, in "The Law of Lawyering," Hazard and Hodes, 3d edition, sec. 8.5, the authors posit that:

Several situations may be imagined in which a substantial nonrefundable fee — better understood as a minimum fee — might be justified. For example, a client might wish to prevent anyone else from retaining the lawyer in connection with a particular matter. Or a client might anticipate needing legal services in the future and wish to insure the lawyer's availability at the time, in effect 'taking an option' on the lawyer's services. Under those and similar conditions, it is not unreasonable for the lawyer to be compensated for the other business opportunities thus foregone.

Retainers paid to an attorney who intends to apply those funds against fees for services to be rendered, whether those fees are flat fees or hourly fees, are advance fees. They do not truly qualify as availability or general retainers.[Ftn 1](#)

Both special and general retainers must, however, be distinguished from nonrefundable retainers. A nonrefundable retainer permits a lawyer to keep the fee paid whether or not the services contemplated have been rendered and regardless of whether the lawyer has incurred lost opportunity costs for making himself available.[Ftn 2](#) There is nothing in *Lochow* that permits a truly nonrefundable retainer — a retainer that may be earned without providing services or ensuring availability.

The problem all too frequently seen in the manner in which nonrefundable retainers have come to be used in Minnesota is that many attorneys are demanding nonrefundable retainers from every client who retains them without regard to whether there truly is a lost-opportunity cost incurred. Further, most of these nonrefundable retainers are, in fact, special retainers — advance fee payments intended to be applied to fees incurred for specific services to be rendered.

By making all retainers nonrefundable, attorneys effectively deprive clients of their right to discharge their lawyer and obtain new counsel without any corresponding benefit to the clients or indication that the lawyer has incurred any particular cost associated with the representation unique to the individual matter.

Clients who have scraped together every last bit of their available funds or, just as likely, borrowed funds in order to pay a significant nonrefundable retainer to an attorney is in no position to discharge that attorney if

they come to believe their interests are not being adequately protected. As stated by the New York Court of Appeals in *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994):

[W]e hold that the use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer. Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship — an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge. The established prerogative which, by operation of law and policy, is deemed not a breach of contract is thus weakened (citations omitted). Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire “nonrefundable” fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement.

While nonrefundable retainers are permitted by the MRPC, they ought to be the exception, not the rule. Both *Lochow* and the language of Rule 1.5(b) permit the charging of a nonrefundable fee only to ensure the lawyer's availability and to compensate the lawyer for the commitment to be available. A nonrefundable retainer should only be utilized where the lawyer will incur real and demonstrable lost-opportunity costs, and the amount charged the client for those lost opportunities must be reasonable.

¹ See *Cluck v. Comm'n for Lawyer Discipline*, 214 S.W.3d 736, 740 (Tex. 2007) (quoting with approval Tex. Comm. On Prof'l Ethics Op. 431. “If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. A fee is not earned simply because it is designated as nonrefundable.”) See also, *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 216 (C.A.3d Pa. 1999) (“The distinction between general and specific retainers is well established. A retainer is general “where the services being purchased are the attorney's availability to render a service if and as needed in a specific time frame’ and thus is ‘earned when paid.’ On the other hand, a retainer is special or specific ‘where the funds paid are for a specific service.’ In that circumstance, the retainer remains the client's property if the contemplated services are not provided.” See *In re Gray's Run Tech., Inc.*, 217 B.R. 48, 52-53 (Bankr.M.D.Pa. 1997); see also *Kelly*, 2 F.Supp.2d at 425-27.”)

² See “Nonrefundable Retainers Revisited” 72 N.C. L.Rev. 1 (1993).