

OPINION 15: RETAINER FEES

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Lawyers Board opinions in recent years have aimed at clarifying lawyering issues which regularly produce friction with clients. Opinions 13 and 14 have helped resolve problems stemming from file copying costs and attorney liens on homesteads.* Opinion 15, issued in September 1991, follows the Minnesota Supreme Court's lead in restating and clarifying attorney obligations in handling retainer fees.

In a recent lawyer discipline decision, the Minnesota Supreme Court cautioned lawyers that "retainer fees not immediately placed in a trust account will be looked upon with suspicion." *In re Lochow*, 469 N.W.2d 91 (Minn. 1991). The decision also addressed the issues of advance fee payment retainers and nonrefundable or availability retainers. The Court noted that it has long been the view in Minnesota that advance payments for future services are client funds until earned. Withdrawals from advanced fee "retainers" should be made only as services are performed and costs incurred on behalf of the client. *Id.* at 98.

The Court also recognized that retainers paid to ensure the lawyer's availability may be nonrefundable and earned upon receipt if they are reasonable. In such instances, however, the purpose of the retainer fee and the client's consent must be in writing. *Id.*

On September 13, 1991, the Lawyers Professional Responsibility Board issued Opinion No. 15, "Advance Fee Payments and Availability or Nonrefundable Retainers." Opinion 15 (reprinted below) codifies the *Lochow* holding concerning "advance fee payments" and "availability or nonrefundable retainers."

The key elements of Opinion 15 are its definitions and a presumption. The opinion defines the terms "advance fee payments" and "availability or nonrefundable retainers" as well as "accounting." All retainer fees are presumed to be advance fee payments unless a written agreement signed by the client states otherwise. Hence, all retainers paid pursuant to an oral retainer agreement are presumed to be advance fee payments.

All advance fee payments as defined by Opinion 15 must be deposited into the trust account and cannot be withdrawn unless the client is given written notice of the time, amount, and purpose of the withdrawal and an "accounting." The notice is not required to be in advance of the withdrawal. An "accounting" requires the lawyer to provide the client with a statement of the balance of the client's funds remaining in the trust account after the withdrawal has been made.

"Availability or nonrefundable retainers" as defined by Opinion 15 must be written and signed by the client. The retainer agreement must inform clients that they may not receive a refund of such retainer fees if they later choose not to hire or to terminate the lawyer's services. Lawyers should understand that the reasonable fee requirements of Rule 1.5 may obligate them to refund some portion of an availability or nonrefundable

fee under certain circumstances. For example, the client could change his or her mind shortly after paying the lawyer a nonrefundable or an availability retainer. If the lawyer has not already performed services on the client's behalf and has not already declined other representation(s), a refund would likely be required in order for the fee to be reasonable. This is the position recently taken by the New York City Bar Association Ethics Committee in Formal Opinion 1991-3 (determination of ethically appropriate fee cannot be made definitively at outset of representation even in nonrefundable retainer cases). Fees paid pursuant to an availability or nonrefundable retainer are not required to be deposited into a trust account nor do they need to be held in trust. The amount of a nonrefundable or availability retainer must be reasonable and is subject to Rule 1.5(a), Minnesota Rules of Professional Conduct, which sets forth the factors to be considered in determining reasonableness.

Lochow and Opinion 15 are not essentially new law. They restate and clarify Minnesota law. They also are consistent with the law in a majority of other states.

Opinion 15 is intended to provide lawyers with further notice of the Court's requirements with respect to their handling of client retainers. The board hopes that Opinion 15 will also reduce attorney-client problems, particularly that of a client seeking return of an unearned portion of a retainer which, unfortunately, the attorney has already spent and cannot refund.

*Opinions 1-13 were printed in the November 1989 *Bench & Bar*. Opinion 14 is printed and discussed in the August 1990 *Bench & Bar*.

OPINION NO. 15

Advance Fee Payments and Availability or Non-Refundable Retainers

DEFINITIONS

- 1) **Advance Fee Payments:** Funds paid by a client or a prospective client to a lawyer for specific services to be undertaken. All fees paid at the beginning of the representation shall be presumed to be advance fee payments unless a written fee agreement signed by the client states otherwise.
- 2) **Availability or Nonrefundable Retainers:** Funds paid by a client or a prospective client to secure a lawyer's general availability to, or representation of, that client over a specified period of time or for a specific legal matter.
- 3) **An Accounting:** An itemized statement issued to a client which lists all trust fund withdrawals (*e.g.*, fees, costs, or expenses) for that client since the last statement and which states the balance of that client's funds remaining in the trust account after the withdrawals have been made.

OPINION

All advance fee payments must be deposited into an interest-bearing trust account in accordance with Rules 1.15(a)(2) and (e), Minnesota Rules of Professional Conduct. A lawyer may withdraw fees from the trust account when earned provided the client is given: 1) written notice of the time, amount, and the purpose of the withdrawal; and 2) an accounting of the client's funds in the trust account. *See In re Lochow*, 469 N.W.2d 91 (Minn. 1991).

Funds paid to a lawyer pursuant to an availability or nonrefundable retainer agreement are not required to be deposited into a trust account or held in trust. All availability or

nonrefundable retainer agreements must be in writing and signed by the client. *Lochow*, 469 N.W.2d at 98. All availability or nonrefundable retainer agreements must include a final paragraph immediately above the client signature line which informs the client that: 1) the funds will not be held in a trust account; and 2) the client may not receive a refund of the fees if the client later chooses not to hire the lawyer or chooses to terminate the lawyer's services. All fees paid pursuant to an availability or nonrefundable retainer agreement shall be reasonable in amount. The factors to be considered in determining the reasonableness of a lawyer's fee include those set forth in Rule 1.5(a), Minnesota Rules of Professional Conduct. Adopted: September 13, 1991.