

ETHICS: REFUNDS OF UNEARNED FLAT FEES

by

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Since the amendment of Rule 1.5(b), Minnesota Rules of Professional Conduct (MRPC), in 2011 lawyers in Minnesota have been permitted to charge clients a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. Rule 1.5(b)(1), MRPC. The rule also permits lawyers to treat such advance payments as their own property, subject to refund, if there is a written fee agreement signed by the client that contains certain required language set forth in the rule. In other words, unlike other types of fees paid in advance of the services rendered, these flat fees do not have to be held in a trust account until they are earned.

Among the provisions required in a written retainer agreement calling for the advance payment of a flat fee is the requirement that the client be notified "that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." Rule 1.5(b)(1)(v), MRPC. This requirement reflects the nature of the fee arrangement with the client. Unlike an hourly fee arrangement, the agreement between the lawyer and the client is that certain specified legal services will be rendered to the client for a specified fixed fee. In essence, the lawyer and client are agreeing in advance as to the value of the services to be rendered.

What happens then, when the legal services, for whatever reason, are not fully provided? This may occur either because the client discharges the lawyer prior to completion of the services, the lawyer withdraws before rendering all of the services, or the lawyer or client dies before the services are fully performed. Rule 1.5(b)(3), MRPC, provides the answer. That rule provides, in pertinent part, "Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the lawyer-client relationship is terminated before the fee is fully earned, the lawyer SHALL refund to the client the unearned portion of the fee." (Emphasis supplied).

Recently there have been complaints filed with the Office of Lawyers Professional Responsibility where the lawyer and client have entered into a Rule 1.5(b) flat fee agreement but the agreed-upon legal services were not fully rendered. In some of those instances, the lawyer claimed that no refund was due because the full fee had been earned even though the agreed-upon services had not been fully rendered. In support

of that claim, the lawyer argues that he had sufficient time spent on the matter such that the fee — as analyzed on an hourly fee basis — has been fully earned. An hourly fee analysis, however, is inappropriate in determining whether a flat fee has been fully earned. The agreement with the client was not an agreement to provide legal services to be billed on an hourly basis. The flat fee agreement fixes a value for specific legal services to be rendered. If those services are not fully rendered, a refund is due to the client no matter how many hours the lawyer has spent on the matter. In determining the value of the partial set of services rendered by the lawyer, the time spent may be considered, but it is not the exclusive factor. Consideration needs to be given to how far along the lawyer has advanced the client's objectives as set forth in the fee agreement and what remains to be done to accomplish those interests after the termination of the attorney-client relationship.

Simply put, if the client did not receive all of the services promised by the lawyer, a refund of some portion of the advance fee paid is required. This concept works the other way around as well. If a lawyer and client agree that specified legal services are to be valued at a specific price and the client pays that price in advance, once the lawyer provides the services promised, the fee has been fully earned. For example, if a lawyer and client agree that the lawyer will be paid a flat fee of \$5,000 in advance for the defense of criminal charges brought against the client and the lawyer is able to have those charges dismissed in short order — well short of the number of hours that would, on an hourly fee basis, justify the \$5,000 fee — the lawyer has nevertheless earned the fee the client agreed to pay.

Finally, when drafting a retainer agreement calling for a Rule 1.5(b) advance payment of a flat fee, lawyers should use the language set forth in the rule in their fee agreements. As noted above, the rule requires that, among other things, the agreement inform the client "that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." Some lawyers have not been using this language in their fee agreements, but have been including language to the effect that "if the agreed-upon legal services are not provided, the client may not be entitled to a refund of all or a portion of the fee." Such language is inappropriate and is contrary to the provisions of Rule 1.5(b)(1)(v) and (3), MRPC, which provide that if the specified legal services are not fully rendered the client "WILL be entitled to a refund" and that the lawyer "SHALL refund to the client the unearned portion of the fee." (Emphasis supplied.) Also note the prohibition in Rule 1.5(b)(3) against describing any advance fee as nonrefundable or earned upon receipt.