

Nonrefundable advance fees to become obsolete

by

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As language evolves, words are lost and gained. A word may fall into disuse and a dictionary will eventually label it archaic. The meaning of a word can also change through widespread misuse, which has been the case in the evolution of the nonrefundable retainer. Labeling a legal fee “nonrefundable” creates an inherent contradiction with the requirements of Rules 1.15(a) and 1.16(d), Minnesota Rules of Professional Conduct (MRPC) and also restricts the right and ability of clients, especially those of limited means, to discharge their lawyer out of fear of losing an advance fee payment.

The Minnesota Supreme Court has adopted amendments to Rules 1.5(b) and 1.15(c)(5), MRPC, in order to provide a clearer statement to lawyers and clients about their rights and obligations when legal fees are paid in advance. These amendments will be effective July 1. Lawyers must amend their written fee agreements to be in compliance with the new requirements.

The amended Rule 1.5(b) generally reaffirms that all advance payment of legal fees should be deposited into a trust account in compliance with Rule 1.15(a), MRPC, but still acknowledges the long accepted practice that some advance fees may be treated as earned so long as they are subject to refund if not completely earned. Rule 1.5(b)(1) permits a lawyer to charge a flat or fixed fee for specific legal services to be paid in advance by the client, but a refund may be required if services are not completed. The lawyer and client must also sign a written fee agreement that informs the client about the nature of the advance fee being paid and the client’s right to a refund. The provisions of Rule 1.5(b)(1) should apply only in instances where a flat or fixed fee is charged. If an advance fee is paid and billed against an hourly rate, any unearned portion of the fee must be held in trust in compliance with Rule 1.15(a), MRPC.

Rule 1.5(b)(2) permits a lawyer to charge an availability retainer - meaning those fees paid to ensure a lawyer’s availability to the client during a specified period of time or matter, which is in addition to and apart from fees for legal services that are provided. The client must be informed in writing that the fee is paid in advance for availability only.

Finally, Rule 1.5(b)(3) prohibits a lawyer from designating any advance fee payment as “nonrefundable.” The purpose behind this change is twofold. The first is to eliminate the contradiction between the concept of a nonrefundable retainer and the provisions of Rules 1.5(a) and 1.16(d), MRPC, and to inform clients of their right to a refund in instances where legal services are not completed. The second is to place the onus on lawyers to take reasonable action to promptly resolve fee disputes with clients in such instances.

The Minnesota Rules of Professional Conduct are available for viewing at the LPRB website <http://lprb.mncourts.gov>. For a more in depth discussion of the history behind the amendments see the July 13, 2010, petition from the Minnesota State Bar Association and Lawyers Professional Responsibility Board, which is also available on the LPRB website.

RULE 1.5 FEES

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Except as provided below, fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15.

(1) A lawyer may charge 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. If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer’s property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3). Such a written fee agreement shall notify the client:

(i) of the nature and scope of the services to be provided;

(ii) of the total amount of the fee and the terms of payment;

(iii) that the fee will not be held in a trust account until earned;

(iv) that the client has the right to terminate the client-lawyer relationship; and

(v) 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.

(2) A lawyer may charge a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed. Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client. The writing shall clearly state that the fee is for availability only and that fees for legal services will be charged separately. An availability fee may be considered to be the lawyer's property upon payment of the fee, subject to refund in whole or in part should the lawyer not be available as promised.

(3) Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund. 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. If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute.