

ETHICS: WHEN IS AN AVAILABILITY FEE APPROPRIATE?

by

**Siama Y. Chaudhary, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

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As part of its efforts to serve members of the Minnesota bar, the Office of Lawyers Professional Responsibility offers an advisory opinion service. Through that service, lawyers may call or email the OLPR with questions pertaining to professional responsibility and their obligations under the Minnesota Rules of Professional Conduct.

The OLPR receives a number of inquiries relating to lawyers' fee agreements. While some inquiries are easily resolved by reference to the plain language of the MRPC — as in whether a fee may be characterized as “nonrefundable” or “earned upon receipt” (the answer is “no,” per Rule 1.5(b)(3), MRPC) — others are a little less straightforward and require a more in-depth interpretation of the MRPC. One such issue that has arisen on several occasions stems from some lawyers' misunderstanding of the true purpose of “availability retainers.”

Rule 1.5(b)(2), MRPC, states:

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.

There is no problem with a lawyer having a retainer agreement (signed by the client) stating that the lawyer will not begin to provide legal services until, for example, at least \$2,500 of a total \$5,000 flat fee is paid. However, the OLPR does not view such an agreement as warranting the characterization of the \$2,500 as an “availability fee.” Such a fee is simply an advance payment against the full fee to be charged. Once that payment is made, it is presumed that the provision of legal services will be commenced.

Although perhaps not altogether clear from the text of Rule 1.5(b)(2), MRPC, it is the OLPR's position that an availability fee is more appropriately charged in, for example, a situation in which criminal charges against a client may be filed and the client wants to ensure that the lawyer is available to accept the representation of the client. Another example is a situation in which a corporate client wants to ensure that a lawyer is available at a moment's notice to travel to protect the corporate client's interests in a potential contract dispute.

While the lawyer under these scenarios awaits instruction from the client, the lawyer would presumably be forgoing other representations in conflict with the client or representations which would render the lawyer unable to immediately drop everything and travel at the client's request. In such representations — with the proper written retainer agreement per Rule 1.5(b) — the lawyer may properly deposit the availability fee into his or her operating account, rather than into a trust account.

Retainers paid to a lawyer who intends to apply those funds against fees for services to be rendered, whether on a flat or hourly fee basis, are advance fees. They do not truly qualify as availability retainers. Availability retainers, by definition, are received in addition to compensation the lawyer receives for work actually performed. At comment e to section 34 of the "Restatement, Third, The Law Governing Lawyers," an "engagement retainer fee" is defined as a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. The comment goes on to state, "A fee is an engagement retainer [in Minnesota, an availability retainer] only if the lawyer is to be additionally compensated for actual work, if any, performed."

In a traditional representation (i.e., a representation not similar to the preceding examples), a client hires a lawyer to represent him/her in a particular legal matter and the client expects (and the MRPC require) the lawyer to be "available" in the sense that the lawyer must respond to client communications and attend client hearings related to the representation. Once a lawyer has been engaged to immediately embark on providing legal services for a client, it is improper for the lawyer to charge that client an availability retainer with respect to that representation.

Availability retainers should only be used where the lawyer will incur real and demonstrable lost-opportunity costs, and the amount charged the client for those lost opportunities must be reasonable.

Questions concerning what constitutes a true availability retainer may be discussed with the OLPR through the advisory opinion service at 651-296-3952 or online through the OLPR website.