

ETHICS OPINION

RO-93-21

Lawyer may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment

QUESTION:

"An issue has been raised in our local grievance committee concerning 'non-refundable' retainers.

Specifically, Rule 1.16(d), RPC, dictates that upon termination of employment an attorney must refund 'any advance payment of fee that has not been earned.'

The question presented is whether, in light of this rule, the mere denomination of a retainer as 'non-refundable' constitutes a per se violation of the Rules of Professional Conduct.

Our committee is divided on this question and therefore seeks guidance from your office in resolving it.

Some on the committee have advanced the position that Rule 1.5 contains a specific list of the types of fee contracts which are expressly prohibited. Therefore, to add an additional proscription by incorporating an interpretation of 1.16(d) which in fact is more properly read as addressing a lawyer's duties to the client while in the process of disengaging from representation would be unwarranted and unfair.

The position of those taking that view is that once the terms of 1.16(d) have been brought to a lawyer's attention, he or she should then be given an opportunity of proving the value of his or her services up to the date of termination and refunding any unearned portion of the fee. If, on the other hand, the lawyer simply insists that 'non-refundable' means precisely what it says, then at that point a violation of the rule would have occurred.

Another position taken by others on the committee is that since the return of any unearned portion of a retainer is obligatory, then to even characterize such a retainer as non-refundable in the lawyer's engagement letter or fee contract is improper and a disciplinary violation despite its absence from the express prohibitions in Rule 1.5.

Our committee has currently under investigation a number of complaints involving this precise issue. Therefore, we would greatly appreciate receiving an opinion, citing relevant authority for its conclusion, addressing this question as soon as possible."

ANSWER:

A lawyer may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment.

DISCUSSION:

The rule in Alabama is that a lawyer is entitled to be reasonably compensated only for services rendered. Hall v. Gunter, 157 Ala. 375, 47 So.2d 144 (1908). Additionally, Rule 1.16 of the Alabama Rules of Professional Conduct provides that upon termination of representation a lawyer shall refund any advance payment of a fee that has not been earned. Consequently, the Disciplinary Commission expressed the view in formal opinion RO-92-17 that "no retainer should be non-refundable to the extent that it exceeds a reasonable fee." The Commission used the word "retainer" in the generic sense to include not only traditional retainer arrangements but all arrangements where fees are paid in advance of services being rendered.

There is an inherent conflict between the lawyer and his client in the setting and collection of the fee to be charged in a legal representation. While this conflict can be minimized by a full and frank discussion in advance of representation it can never be completely eliminated. Indeed, Rule 1.5 now mandates that the lawyer communicate the

basis of the fee charged, prior to or soon after representation is undertaken.

It is essential in these discussions that the client not be misled. Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation.

Rule 1.4(b) provides the following:

"Rule 1.4 Communication

* * *

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rule 1.5(b) provides the following:

"Rule 1.5 Fees

* * *

- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

"Under Rule 1.4, a client must be given sufficient information so that he is able to direct the lawyer's actions intelligently. An important consideration for many clients whether the services received will be worth the price. Similarly, a client's decision to

continue pressing a legal matter may be heavily influenced by the prospective costs involved." Hazard and Hodes, The Law of Lawyering, 2d ed., Prentice Hall Law and Business, p.93. Obviously, information regarding the refundability of the unearned portion of a fee would be critical to an informed decision by the client regarding engaging in or continuing a legal matter.

An indication by the lawyer that the fee is non-refundable is a misrepresentation and, thus, a violation of Rule 8.4(c). That Rule, in pertinent part, provides as follows:

"Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * *

(c) Engage in conduct involving ...misrepresentation."

In Matter of Cooperman, 591 N.Y.S.2d 855, 857 (A.D.3Dept. 1993), the appellate court held that non-refundable retainer agreements are against public policy and, therefore, void. In making this determination, the Court stated:

"Since an attorney's fee is never truly nonrefundable until it is earned, the use of this term, which by definition allows an attorney to keep an advance payment irrespective of whether the services contemplated are rendered, is misleading, interferes with a client's right to discharge an attorney, and attempts to limit an attorney's duty to refund promptly, upon discharge, all those fees not yet earned.

The respondent's use of a non-refundable retainer agreement precisely illustrates the abuse inherent in such retainers. The words 'non-refundable fee' are imbued with an absoluteness which conflicts with DR 2-110(A)(3), which provides

that a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. We find the use of these retainer agreements to be unethical and unconscionable in spite of the inherent right of attorneys to enter into contracts for their services.”

Additionally, non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in. In Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), the court recognized the valuable right of a client to discharge a lawyer that the client no longer trusts and the requirement that the discharged lawyer collect his fee on a quantum meruit basis. The rationale of the court was that the risk of paying a fee to the discharged lawyer and a fee to the new lawyer would seriously chill the client's right to discharge. Similar logic would apply here in that the client faced with what the client believes to be a non-refundable fee, may be reluctant to discharge the lawyer and be forced to continue with a lawyer in whom the client has no confidence. The court in Cooperman found that any attempt by a lawyer to hinder the right to discharge the lawyer contravenes the Code of Professional Responsibility by which all lawyers are bound. (Supra, at 858).

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