

NON-REFUNDABLE RETAINERS

Introduction.

The Lawyer Disciplinary Board frequently receives complaints from clients who have entered into agreements with counsel which provide for non-refundable payments. Each case must be reviewed on an ad hoc basis, but there are general guidelines applicable where a non-refundable agreement may violate the Rules of Professional Conduct.

Discussion - West Virginia Rules of Professional Conduct.

The applicable West Virginia Rules of Professional Conduct include but are not necessarily limited to Rule 1.5. The thrust of the rule is that "a lawyer's fee shall be reasonable." Rule 1.5 specifies eight factors to be considered in determining the reasonableness of an attorney's fee. Comment 2 to the rule provides, "A lawyer may require advance payment of fee, but is obliged to return any unearned portion." Rule 1.16(d) states that, "Upon termination of representation, a lawyer shall take steps to the extent practicable to protect the client's interests, such as... refunding any advance payment of fee that has not been earned."

Advances vs. Retainer Fees.

There are two main types of retainers. (1) In the first, attorneys are hired to be available to do such business as might be needed. Their fee is akin to a salary; they are being paid for availability rather than for a specific work product. This type includes those arrangements where the client does not expect a work product at all, but wants to prevent the attorney from working for

an opposing party. (2) In the other type of arrangement, an attorney is hired to accomplish a particular task. This second type of retainer is the one most fraught with misunderstanding.

Consumers of legal services often protest when circumstances change and attorneys' services are not required as expected, but fees are not refunded. An indication of the magnitude of the problem can be estimated from the fact that 31% of the complaints received by the Board in 1997 were for fee-related or financial issues.

Most lay people expect that eventually work will be done to justify their fees. When circumstances change, and the work is not done, most people feel cheated when their fees are not refunded no matter what contract they signed.

Many jurisdictions have banned the non-refundable retainer; for example, the New York Courts in In re: Cooperman, 591 N.Y.S. 2d 855 (1993), held that the use of a "non-refundable fee" retainer was in violation of DR 2-110 (A) (3), resulting in a two year suspension. Oklahoma, Indiana, and many other jurisdictions have imposed discipline for failure to return a retainer. Similarly, in an earlier "Informal Opinion"(2/93), the West Virginia Committee on Legal Ethics stated that there is technically no such thing as a "non-refundable retainer" because if a fee does not meet the test of reasonableness, the attorney is in violation of Rule 1.5. Rule 1.16(d) also requires the refund of any unearned advance payment.

Cases and Ethics Opinions from West Virginia.

Recently, in Statler v. Dodson, 195 W.Va. 646, 466 S.E.2d 497 (1995), the West Virginia Supreme Court held that where an attorney had been discharged, without fault on his part, from further services and a suit just begun by him under a contingent fee agreement, his measure of damages is but the value of services rendered. See also, Committee on Legal Ethics of West

Virginia State Bar v. Gallaher, 180 W.Va. 332, 376 S.E.2d 346 (1988) and Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986).

What constitutes a reasonable fee will vary with the circumstances. Annotated Model Rules of Professional Conduct Rule 1.5 (3d ed. 1996) p. 47. Dale R. Agthe, Annotation, Attorneys Charging Excessive Fee as Ground for Disciplinary Action, 11 A.L.R.4th 133.

In light of these concerns, the following guidelines are proposed:

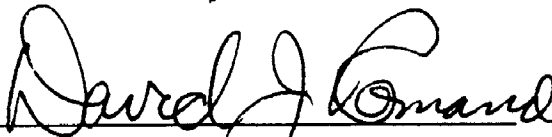
1. In the type of agreement in which a specific work product is expected, avoid the concept of "non-refundable retainers." All fees must be earned. Rule 1.16(d).

2. In the type of agreement where the attorney is retained for availability, it is not a per se violation of the Rule 1.5 for an attorney to enter into a non-refundable written fee agreement provided the same is clearly explained to the client.

3. It is, however, a violation of Rule 1.5 if the agreement is enforced with the effect of the attorney charging an unreasonable fee.

4. Any agreement concerning non-refundable retainers must be written and explained to the client and must meet the reasonableness test of Rule 1.5. If the facts and circumstances of the case indicate that the effect of the non-refundable retainer is an unreasonable attorney fee, counsel will be subject to discipline for violation of Rule 1.5 and the possibility of disgorgement of the fee.

APPROVED by the Lawyer Disciplinary Board this 30th day of April, 1999.


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Lawyer Disciplinary Board
State of West Virginia

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