Informal 00-12

June 19, 2000

INFORMAL OPINION 00-12

"Nonrefundability" of Retainers

You have requested an Informal Opinion as to whether a client's retainer or advance may be "nonrefundable." You have also asked whether, if nonrefundable retainers or advances are permitted, such a "nonrefundable" retainer or advance can be taken in a matrimonial matter.

Lawyers in Connecticut should approach the concept of "nonrefundability" of retainers or advances with considerable caution. The concept of "nonrefundability" is as slippery as a watermelon seed. Furthermore, the possible factual situations to which "nonrefundability" might be applied are so many and so varied that a general rule is extremely difficult to promulgate.

In attempts to parse the "nonrefundability" sentence, courts, bar association ethics committees, grievance committees and other disciplinary boards and commentators have attempted to divide such fees into two categories: namely retainers and advances. The opinions and literature have dealt with particularly fact-specific analyses, and even with very similar facts, and have reached divergent results.

A retainer has been defined as a fee paid by a client and designated as "nonrefundable" by the attorney, even if the client terminates the attorney-client relationship and regardless of whether any professional services are actually rendered. Pennsylvania Bar Association Committee of Legal Ethics and Professional Responsibility, Opinion 95-100 (1995). Retainers in such situations are justified with the argument that in a retainer agreement, the client is paying solely for the assurance that the attorney will not represent a client with a conflicting interest, and the performance of future services by the attorney, although they may be included within the retainer performed, are not necessarily required. Further argument is that the attorney may have to forego representing clients in other matters due to conflicts or time restraints, and that the purpose of the retainer is to "remunerate him for loss of opportunity to accept other employment." The Supreme Court of Texas, Professional Ethics Committee, Opinion 431 (1986).

However, in each instance, the lawyer must provide some consideration, whether it be action in the form of professional services, or inaction in the form of refraining from representing other clients with conflicting interests or refraining from filling his time completely with some activity which prevents the lawyer from being "available" to the client. For an extreme case, *see Ryan v. Butera et al*. 193 Fed. 3d 210 (3rd Cir. 1999) (Lawyer permitted to retain one million dollar nonrefundable retainer after ten weeks' work where lawyer had been required to be available "as needed" in client's bankruptcy matter.) In that case, the lawyer provided consideration consisting of ten weeks' work and "availability as needed" in the client's bankruptcy matter. If the lawyer had gone to Timbuktu for the entire pendency of the bankruptcy matter, making himself unavailable even by cell phone, or had made himself otherwise unavailable to that client, we find it difficult to believe that a court would have confirmed the "nonrefundability" of the fee. Disability due to illness or injury is more problematic, but it only emphasizes the morass into which a lawyer steps when he or she presumes to enter the world of "nonrefundability."

A common form of retainer is a payment to the lawyer to be available and to perform services "as needed" over a period of time, such as a year. However, the nonrefundability of the retainer presumes that

the lawyer will be available, and, in many circumstances, will perform services "as needed." The word "retainer," then, describes a form of payment to a lawyer which is a lump sum in advance for performance of services described in advance "as and if needed" with the understanding that if the client makes only a limited demand upon the lawyer for services during the period, or even makes no demand at all, the lawyer retains the fee.

However, designating a fee as "nonrefundable" is not determinative. The Rules of Professional Conduct in Connecticut nowhere use the word. Rule 1.5, which governs fees, in its initial sentence proclaims that "a lawyer's fee shall be reasonable." Nowhere do we find an exception for fees which have been designated by the lawyer as "nonrefundable retainer." Also, included in the Commentary, is the following:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interests. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay....

In the absence of any such indication in rules, designation of a lump sum fee paid in advance as "nonrefundable" cannot except the fee from the requirement that a fee be reasonable. The factors to be used to determine reasonability are described in Rule 1.5, assisted by the Commentary, and include both consideration of the services performed for the client, as well as the deprivations which may be suffered by the attorney. Aspects of deprivation described in the rule include whether acceptance of the client's matter will prevent the attorney from procuring other employment, the time, labor, novelty and difficulty of the issues of a particular case, whether representing a particular client will necessitate the loss of other employment opportunities, or the case will utilize much of the firm's resources which also might result in fewer clients being retained.

Although a fee is described as "nonrefundable," and must necessarily be described in the engagement letter required under Rule 1.5(b), the term does not describe actions taken at the commencement of the representation. Where there is a retainer, it is normally paid by the client to the lawyer at the commencement of the representation. However, a "refund" and therefore, "refundable" and "nonrefundable," describe a payment from the lawyer to the client. This must necessarily postdate the initial payment of the fee by the client. Therefore, determination of the enforceability of a "nonrefundable" feature of a retainer fee, must include relevant circumstances which have occurred after the initial engagement and payment of the fee by the client, if there are any.

Opinions and Commentary have distinguished an "advance" from a "retainer." An advance has been defined as "to pay money or render other value before it is due; to furnish something before an equivalent is received." *Black's Law Dictionary*, 712 (4th ed. 1968). The client gives his or her attorney an advance in anticipation of future services and those services, as they are rendered, will be offset against the advanced payment. The two concepts have been described as different in that, unlike retainers, an advance is the payment or deposit for the future services to be performed by the attorney, while a retainer, as stated hereinabove, is paying for the availability of the attorney or for performance of specific services by the attorney, without reference to and regardless of whether any services are actually rendered.

The use of "nonrefundable" retainers has been both endorsed and criticized. Numerous states have upheld the use of "nonrefundable" retainers if the attorney adheres to certain safeguards. Alaska Bar

Association Ethics Committee, Opinion 87-1 (1987); State Bar of Michigan, Standing Committee on Professional and Judicial Ethics, Opinion R-7 (1990). Other sources have criticized "nonrefundable retainers." *See In Re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994). Commentators have gone both ways. *See also*, Brickman and Cunningham, *Non-Refundable Retainer: A Response to Critics of the Absolute Ban,* 64 U.Cinn. L. Rev. 11 (1995); Lubet, *The Rush to Remedies: Some Conceptual Questions About Non-Refundable Retainers*, 73 North Car. L. Rev. 271 (1994); McKinnon, *Analytical Approaches to the Non-Refundable Retainer*, 9 Georgetown Journal of Legal Ethics 583 (1995); Brickman and Cunningham, *Non-Refundable Retainers Revisited*, 72 North Car. L. Rev. 1 (1993). The Colorado Supreme Court has also weighed in on the issue. ABA/BNA *Lawyers' Manual on Professional Conduct, Current Reports*, Vol. 16, No. 10, Page 268.

Our deliberations have determined that it is not uncommon for lawyers who practice in certain areas of the law (such as criminal law) to be paid a fixed lump sum fee prior to the commencement of the representation. The fee is for a particular service, such as appearance at a hearing or a trial, or defense of the accused until the matter is disposed of, or until completion of the trial level, *etc*. and the fee does not depend upon the amount of time or effort which the attorney expends during the representation. For example, an attorney can accept a lump sum fee for representation in a criminal matter, and then convince the prosecutor to dismiss the action in one conference or court appearance. Successful results make the fee reasonable, regardless of the amount of time spent to achieve the results. Even if the result is not particularly successful, if the services agreed upon have been performed, and the fee is reasonable, the lawyer will not be required to refund any of the fee to the client. We see no basis upon which to criticize that practice. In fact, the practice serves the laudatory purpose of providing legal services to those who need them. The reasonableness of the fee may be determined upon time, or upon the other factors described in Rule 1.5. However, if the client pays a lump sum fee before the engagement, and, through no fault of the client, the lawyer does not perform as agreed, that is, does not see the prosecutor, does not go to court, does not participate in the trial, and in one of those ways does not fulfill the obligations of the engagement, then designation of the fee as "nonrefundable" cannot protect the attorney from a requirement to refund all or a portion of the unearned fee.

Although the term "advance" normally contemplates the performances of services, whereas the term "retainer" normally implies either, or both, services or depravitory inaction, the distinction between the two becomes muddled in the application to individual facts, situations and complicating factors. In the case of an advance, for example, the "equivalent" to be received by the client could be the right to call upon the attorney for services, even though no services are actually called for.

Similarly, the application of the term "nonrefundable" can lead to confusion. As we have stated, a fee, whether designated a nonrefundable retainer or not, must be fair and reasonable. South Carolina Bar Ethics Advisory Committee, Opinion 93-12 (1993). The amount of nonrefundable retainer should not be so great as to restrict a client's right to discharge his or her attorney at any time with or without cause. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 95-100 (1995). If the fee is excessive, then the client may be persuaded not to terminate his or her attorney-client relationship, knowing that he will not recover this amount paid. "The amount of the retainer should not be so great as to influence a client to pursue litigation contrary to public policy or to the best interests of the client." Alaska Bar Association Ethics Committee, Opinion 87-1 (1987).

Our deliberations indicated that disciplinary boards are not unfamiliar with grievances against attorneys who have accepted a fee for a service but have failed to perform the service. Application of the term "nonrefundable" to the fee is no protection for such attorneys. *See*, for example, *Connecticut Lawyer*, Vol.

10, No. 5, p. 16 "Professional Discipline Digest."

Even if used, the "nonrefundability" feature must meet requirements. It should be fully explained to the client, orally and in writing, to ensure that the client completely understands the amount to be paid and the nature of the services to be performed or the deprivation to be suffered by the attorney. The client's state of mind and ability to understand the agreement are also essential. Alaska Bar Association Ethics Committee, Opinion 87-1.

Whether or not the term "nonrefundable" is used by an attorney to describe a retainer fee, that fee must be reasonable according to Rule 1.5, there must be an engagement agreement or letter in writing which makes clear to the client the amount of the fee and the services or other consideration to be provided, the time or other limitation, and the client must be sufficiently intelligent to understand the amount of the fee and the nature of the services or inaction, and the retainer must not be so large as to likely chill the client's right to terminate the attorney-client relationship if the client becomes dissatisfied with the attorney's services. Because of the considerations we have described, many lawyers will decide that it is unwise to use the term "nonrefundable" with regard to a flat fee charged at the commencement of an engagement, and, rather, rely for a claim of nonrefundability upon the description of the fee and the consideration for the fee, provided both orally and in the engagement agreement or letter, as required by Rule 1.5.

Your second question asks whether a "nonrefundable retainer or advance" can be taken in a matrimonial matter. All of the considerations that we have described hereinabove are applicable to matrimonial matters as well as any other. However, there are additional considerations which govern these in matrimonial matters. In our consideration we do not include in our definition of a "matrimonial matter" a proceeding that has as its sole purposes post-judgment collection of alimony or child support arrears, as such actions have appropriately been classified as "debt collection" and may be approached differently. *See e.g., Davis v. Keenan*, Statewide Grievance Committee, #91-0409, at 7 Connecticut Family Lawyer, No. 4, p.27 (Fall 1992) (not unethical to charge contingency fee in post-decree alimony collection action).

Several features apply especially to matrimonial matters or apply with greater force in matrimonial matters. First, allowing a fee in a matrimonial matter as a "nonrefundable" fee seems to undervalue the character of the particular nature of the relationship between lawyers and clients in dissolution and other matrimonial matters. *See*, *Monroe v. Monroe*, 177 Conn. 173 (1979). Second, such a fee arrangement can leave the client "captive" to counsel, unduly undermining the client's right to choose counsel. This problem arises in marital matters: (a) because the client may hesitate to leave counsel because he or she doesn't want to lose the "unearned" portion of the retainer; (b) the funds "left behind" may be all that the client has available to retain new counsel; and (c) in the intense emotional atmosphere of a matrimonial matter, the client may have made an emotional investment in the attorney-client relationship which may prevent or at least dilute their ability to form another relationship with a new attorney. We have indicated our disapproval, in other contexts, of fee terms that inhibit a client's ability to change counsel or control the ultimate outcome of the case. *See* Informal Opinion 95-24. Also, the financial aspects of a domestic relations matter must be taken into consideration. Since all of the financial resources of the parties are subject to the court's jurisdiction, the retention of unearned fees may be the retention of an interest in property that is the subject matter of the litigation, which is barred by Rule 1.18(j). *See also*, Connecticut Practice Book § 25-5(a)(1). In Informal Opinion 87-3, it concluded that Rule 1.18(j) did not inhibit lawyers from taking mortgages on "marital" property to secure fees, but the Statewide Grievance Committee has not agreed with us. Furthermore, an important distinction can be made between authoritative opinions, which involved fees that had been, or were being, earned, and Opinions, which involved funds that were being withheld from the client by the lawyer, even if not earned.

These additional features make it even less likely that a careful attorney will apply the term "nonrefundable" to a fee paid in a matrimonial matter.

In summary, whether or not a "nonrefundable" fee is ethical, depends upon what "nonrefundable" is. Neither the term "nonrefundable," "refundable," "retainer" nor "advance" is used in Rule 1.5, which is the portion of the Rules of Professional Conduct governing fees.

Therefore, the use of such terms neither adds to nor subtracts from the ethical nature of the fee. Whether or not a fee or a fee agreement is ethical, depends upon the factors proscribed in Rule 1.5. A careful lawyer would recognize that any and all features of a fee or a fee agreement should be spelled out in the engagement letter or the agreement.

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