Utah Ethics Opinions

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136. USB EAOC Opinion No. 136

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 136

Approved July 29, 1993

Issue:Can an advance payment made by a client ever be characterized as a "fixed fee" or "nonrefundable retainer", which would be earned by the attorney when received and therefore not deposited into a trust account?

Opinion: Fixed-fee contracts (nonrefundable retainers) are not prohibited by Rule 1.5 of the Rules of Professional Conduct. Under appropriate conditions, a nonrefundable retainer may be considered earned when paid and, therefore, may be deposited into the attorney's operating account rather than his trust account. However, a nonrefundable retainer is, like any other type of fee, subject to the standard of Rule 1.5 that an attorney "shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." As a result, although considered earned on payment, a nonrefundable retainer may be subject to disgorgement if it is clearly excessive under Rule 1.5. Furthermore, a fixed fee should be clearly set out in a written fee agreement that clearly informs the client of what circumstances would entitle him to a disgorgement of all or part of the "nonrefundable" retainer.

Analysis: Rules of Professional Conduct 1.5 provides: "a lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." A fee is "clearly excessive" if a lawyer of ordinary prudence, after reviewing all of the facts, would be left with a definite and firm conviction that the fee is not reasonable. Rule 1.5 sets out several factors for determining whether the fee is reasonable. The only specific types of fees expressly prohibited by Rule 1.5 are contingent fees in divorce and criminal defense cases. (fn1)

Since a nonrefundable retainer is not specifically prohibited under Rule 1.5(d), the question is whether nonrefundable retainers should be considered *per se* unreasonable fees under the rule. The only apparent authority for a *per se* prohibition is *In re: Cooperman*, (fn2) a recent New York case. The Second Judicial Department of the Appellate Division of the New York Supreme Court held that nonrefundable retainers create a chilling effect on a client's right to discharge his attorney at any time with or without cause. The court also based its decision on its opinion that the term "nonrefundable" was "imbued with an absoluteness which conflicts with DR 2-110(A)(3), (fn3) 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."

The decision in *Cooperman* conflicts with several other court and bar association opinions, including the opinion of the First Judicial Department of the same New York court in *Jacobson v. Sassower*. (fn4) In *Jacobson*, the court held that whether a nonrefundable retainer has a chilling effect on a client's right freely to discharge his attorney depends on a "full exploration of all the facts and circumstances of the particular case, including the intent of the parties and whether the fee demanded is out of proportion to the value of the attorney's services." Other courts have also reviewed such fees in terms of whether the total fee was reasonable and not whether any portion of it is nonrefundable.**5**

The court in *Bain v. Weiffenbach* (fn6) was faced with a suit by a client to recover a portion of a $10,000 "nonrefundable" retainer paid to his attorney for representation in a criminal case. Relying heavily on Ethics Opinion 76-27 of the Florida State Bar, the court analyzed the entire fee on whether it was reasonable, accepting that nonrefundable retainers are not *per se* prohibited. The Florida Court of Appeals posed the question as follows:

If a substantial "nonrefundable retainer" which is in part a prepaid fee is paid to an attorney and, before the attorney performs any service under the contract, the client dies, or fires the attorney, or the services called for by the contract are no longer needed for some other reason, would the attorney be guilty of charging a clearly excessive fee under DR 2-106(A) if he refused to refund any of the "nonrefundable retainer"?

The court went on to analyze the question and conclude that such a fee was neither automatically prohibited nor automatically permitted.

Such a lawyer might, but would not necessarily be, guilty of charging an excessive fee . . . . We interpret the question as referring to a payment by a client to a lawyer of a sum of money designated as "nonrefundable retainer," part of which is intended to compensate the lawyer for being available but not for specific services, and part of which is intended as a present payment for legal services to be performed in the future. If the lawyer performs no legal services, obtains no benefits for the client and has not lost other employment opportunities as a result of agreeing to

represent the client, we believe he might well be guilty of charging an excessive fee if he refused to refund part of it. . . . On the other hand, a lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he had lost or declined other employment in order to represent that particular client. . . . We do not believe that, by designating a retainer as "nonrefundable," a lawyer automatically insulates himself from a claim that the fee is excessive. Whether the fee is excessive is governed by DR 2-106 rather than use of the description "nonrefundable retainer." (fn7)

A designation of a fee as "nonrefundable" can, of course, never supersede the requirements of Rule 1.5, which proscribe excessive or unreasonable fees, and Rule 1.14, which requires the return of unearned fees. Thus, the term "nonrefundable" really is a misnomer; such fees are more appropriately termed "fixed fees."

Certainly, in some contexts fixed-fee contracts are definitely reasonable. In an article criticizing the *Cooperman* opinion, (fn8) Professor Stephen Gillers points out that in some instances (such as complex commercial or criminal litigation), a lawyer's commitment to be available has value in and of itself. In addition, he notes that an attorney's acceptance of a matter, even for a short while, may, on conflicts grounds, disqualify the attorney and his firm from accepting other matters. A fixed-fee agreement in these instances compensates the attorney in part for accepting that conflict.

Consequently, whether a fixed-fee agreement is clearly excessive depends on whether the total fee meets the standards set out in Rule 1.5 and not on whether any part of it is treated in the fee agreement as nonrefundable. The fee agreement should, however, clearly set forth (a) what portion of the retainer is considered to be nonrefundable, (b) that nonrefundability is conditioned on the absence of default by the lawyer, and (c) what circumstances may entitle the client to a disgorgement of all or part of the "nonrefundable" amount. Since the "nonrefundable" portion is considered earned upon payment, it may be deposited into the attorney's general operating account rather than in his trust account. (fn9) However, the attorney may be required to return a portion of the fixed fee if the fee is clearly excessive under Rule 1.5 (a) as a result of changed circumstances, (b) failure to perform the requested services, (c) failure to convey any benefit to the client, and (d) the lawyer suffered no lost employment from the engagement.

Footnotes

1. Rules of Professional Conduct 1.5(d).

2. No. AD90-00429 (N.Y. App. Div., 2d Dept. Jan. 25, 1993).

3. Utah Rule 1.14(d) corresponds to DR 2-110(A)(3). Utah adopted the Rules of Professional Conduct in place of the Code of Professional Responsibility (and the disciplinary rules) in 1988.

4. 483 N.Y.S.2d 711 (N.Y. App. Div., 1st Dept. 1985).

5. *Bain v. Weiffenbach*, 590 So. 2d 544 (Fla. App. 1991); *In re Cook*, 526 N.E.2d 703 (Ind. 1988); *Jennings v. Backmeyer*, 569 N.E.2d 689 (Ind. App. 1991); *Smith v. Binder*, 477 N.E.2d 606 (Mass. App. 1985); *Brandes v. Zingmond*, 573 N.Y.S.2d 579 (Sup. Ct. N.Y. 1991).

6. 590 So. 2d 544 (Fla. App. 1991).

7. *Id.* at 545 (quoting Professional Ethics of the Florida Bar, Opinion 76-27). Reference to the old Disciplinary Rules, rather than the Rules of Professional Conduct does not detract from the applicability of this analysis.

8."All Non-Refundable Fee Agreements Are Not Created Equal," New York Law Journal, February 3, 1993.

9. Ethics Opinion No. 509, Oregon State Bar; Ethics Opinion No. 29, Hawaii State Bar; *see Bain v. Weiffenbach*, 590 So. 2d 544 (Fla. App. 1991).

Rule Cited:

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