## ALASKA BAR ASSOCIATION ETHICS OPINION 2009-1

# Misleading to Characterize a Fee or Retainer as "Nonrefundable." (Modification of Ethics Opinion 87-1)

## **Question Presented**

Do the Alaska Rules of Professional Conduct preclude a lawyer from characterizing a fee or retainer as "nonrefundable"?

### Conclusion

Every fee must be reasonable and is subject to the standards of Rule 1.5 of the Alaska Rules of Professional Conduct as well as to review by fee arbitration. For that reason, it is misleading to describe a fee or retainer in any way as "non-refundable."

### **Discussion**

The issue of "nonrefundable fee deposit or retainer agreements" was previously addressed in Ethics Opinion 87-1 which cautioned lawyers against using such agreements due to the potential for misleading clients and the possibility of excessive fees. Despite the adoption of 87-1, the use of "non-refundable retainers" and advance payment of "minimum fees" continue to be reported in disciplinary and fee arbitration matters. Because Alaska has also adopted the Rules of Professional Conduct which have recently been revised pursuant to Supreme Court Order 1680, the Ethics Committee has been asked to revisit the issue.

Ethics Opinion 87-1 addressed the issue, stating in part:

Historically, retainers were taken by attorneys as an engagement fee, separately from the fee for actual services rendered. The purpose for this engagement fee was to pay the attorney to take the case and make him or herself available to the client, thereby causing the attorney to refuse other employment and to be precluded from representing the opposing side.

. . . .

In current practice, non-refundable retainers are generally deposits against which a certain number of hours are charged. Hours in excess of the stated amount are generally charged against the client at a stated rate. Occasionally, non-refundable retainers are flat fees which are kept whether or not the matter is taken to completion by the attorney.

. . . .

This Committee finds that a non-refundable retainer may be charged to a client if the nature of the retainer as non-refundable is fully and clearly explained to the client, orally and in the written fee agreement, and if the fee is not excessive, considering the factors of DR 2-106.

. . . .

The attorney must refund the non-earned portion of a non-refundable retainer if the attorney withdraws from representation of the client. The attorney must also refund a portion of the non-refundable retainer if, at the cessation of representation, the retainer would be excessive under the circumstances of the particular matter.

Since the adoption of 87-1, numerous opinions have been published in other jurisdictions illustrating the potential for abuse resulting from fees characterized as "nonrefundable retainers" or "advance payment of minimum fees." Examples include a contingency fee lawyer requiring a flat fee for purposes of "investigation", In the Matter of Stephens, 851 N.E. 2d 1256 (Ind. 2006)(public reprimand); a criminal lawyer taking a flat fee and performing no work, In re Disciplinary Proceeding Against DeRuiz, 99 P.3d 881 (Wa. 2004)(6 month suspension); a civil lawyer immediately spending a \$20,000 nonrefundable retainer/minimum fee and then being unable to perform the contracted legal services, In the Matter of Sather, 3 P. 3d 403 (Colo. 2000); a lawyer's continuing practice of requiring a \$15,000 "minimum fee" even if his work product was limited to the entry of a written court appearance, In the Matter of Cooperman, 591 N.Y.S. 2d 855 (A. D. 1993)(2 year suspension); and, lawyers collecting flat fees and failing to administer such payments through a trust account, In the Matter of Kendall, 804 N.E. 2d 1152 (Ind. 2004)(public reprimand). Because of these abuses, the Washington Supreme Court has amended its Rules of Professional Conduct 1.5(f) and 1.15A to address the issue.

Rule 1.5(a) of the Alaska Rules of Professional Conduct requires that fees be reasonable according to the following factors:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

<sup>&</sup>lt;sup>1</sup> This opinion does not address any issue as to when an advance fee is deemed earned and, therefore, available for the attorney's immediate use.

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.

Regardless of how a fee is characterized, e.g., "a nonrefundable retainer<sup>2</sup>," "a fee earned upon receipt," a "flat fee," a "minimum fee," etc., these factors continue to apply to the lawyer's fee. If unreasonable, the fee is improper. It is for that reason that a lawyer's characterization of amounts paid to the lawyer as being "nonrefundable" is fundamentally misleading.

Upon termination of representation, Rule 1.16(d) requires "refunding any advance payment of fee that has not been earned." Again, regardless of how a fee is characterized, this requirement applies to the lawyer's fee. Even if characterized as nonrefundable, an unearned fee must be refunded. Because characterizing the fee as nonrefundable incorrectly suggests that a client has no recourse against the lawyer, this practice is fundamentally misleading.

Approved by the Alaska Bar Association Ethics Committee on April 2, 2009.

Adopted by the Board of Governors on May 5, 2009.

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<sup>&</sup>lt;sup>2</sup> As stated in Ethics Opinion 87-1, the sole justification for a "nonrefundable retainer," considered earned immediately upon receipt appears to be a payment intended exclusively to ensure that the attorney is available to the client such that the attorney must refuse other employment and cannot represent an opposing side. See In the Matter of Klos, 692 N.E. 2d 565, 567-68 (Ohio 1998). In other circumstances, this characterization of the contractual relationship serves only to mislead a client into submitting to a potentially excessive fee. The Committee cautions that any "retainer" fee solely for purposes of ensuring availability must be clearly and fully explained to the client both orally and in the written fee agreement. Even then, the fee must not be excessive under the standards of Professional Conduct Rule 1.5(a).