

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2012-2**

Deposit of Advanced Fee Retainers in Client Trust Account

Question Presented

How Should a Flat or Fixed Fee be Treated by a Lawyer during the Representation of a Client?

Conclusion

All “flat fees”, “fixed fees” or similar fee arrangements, however denominated, should be placed into a client trust account until earned, unless after consultation, the lawyer and client agree in writing: (1) that the funds will become the property of the lawyer when paid, (2) that they will not be held in a client trust account; (3) that the lawyer and client acknowledge the special purpose of the retainer arrangement; (4) that the client has been advised of the potential consequences of the retainer agreement; and (5) that the fees become earned for purposes of a potential refund on a specified and reasonable basis that will not result in an unreasonably high fee for legal services actually rendered.

Applicable Rules and Analysis

Alaska Bar Association Ethics Opinion 87-1 approved the use of “non-refundable fee deposit or retainer agreements” so long as 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....” Fee agreements of this type, also denominated “prepaid fees” or “advance fee retainers” typically provide that the client pays the attorney in advance for some or all of the legal services which the attorney is expected to provide on behalf of the client.¹ These arrangements are different from “security retainers”

¹ In this opinion, the term “flat fees”, shall refer to all “fixed fee”, “prepaid fee” and “advance fee retainer” arrangements.

in which the attorney holds client funds solely to secure the ability of the client to pay for the attorney's expected services.²

Alaska Bar Association Ethics Opinion 2009-1 adopted the conclusion of Ethics Opinion 87-1 that flat fees and similar arrangements are permissible, but further concluded that a lawyer may not characterize them as “non-refundable, because a lawyer must refund the unearned portion of such a retainer if the representation is terminated prematurely. See, ARPC 1.16(d) (“Upon termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as ... refunding any advance payment of fee or expense that has not been earned or incurred.”) The issue before the Committee is how funds paid as a flat fee are to be treated by the lawyer during the representation.

In the case of a security retainer, without question the funds must be deposited in the client trust account pursuant to ARPC 1.15(a).³ It is likewise clear that classic retainers, in which the client has agreed to pay to secure the lawyer’s availability over a specified period of time, whether or not legal services are actually rendered, may not be deposited in the trust account because the funds are the property of the lawyer when paid and may not be commingled with the client’s funds. Dowling, 875 N.E. 2d at 1018; ARPC 1.15(b).

The answer is not so obvious in the case of a flat fee. Whether the flat fee is treated as client funds or the property of the lawyer upon payment could have substantial consequences for the client. If the funds remain the client’s property – and are thus required by ARPC 1.15(a) to be segregated in a trust account – they will be subject to claims of the client’s creditors. A client facing determined creditors may need to ensure that she has the wherewithal to resist the creditors’ claims by funding her legal defense in advance. Once the defense funds become the lawyer’s property they are often beyond the reach of creditors

² For a general discussion of the types of retainers, see, In re Montgomery Drilling Co., 121 Bankr. 32, 37-38 (Bankr. E. Dist. Cal. 1990); Dowling v. Chicago Options Associates, Inc., 875 NE2d 1012, 1018 (Ill. 2007).

³ ARPC 1.15(a) provides: “A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or the third person. Other property shall be identified as the client's or the third person's and appropriately safeguarded. Complete records of these account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation..”

and the lawyer is under an obligation to provide the legal services required to resist the creditor's claims.

The client faces a different danger if the funds become the property of the lawyer upon payment: the funds could be dissipated by the lawyer or lost to the lawyer's creditors. If the client wishes to discharge the lawyer or the lawyer becomes incapacitated, the client's right to a refund may be of little value if the funds are no longer available. In such a case, the client will have been best served by an agreement in which flat fees are denominated to be the property of the client, and thus, kept in a client trust account.

The ARPC provides no direct answer to the question of whether and for how long flat fees must be kept in a client trust account. ARPC 1.15(a) requires a lawyer to hold a client's funds in a separate account but does nothing to assist in identifying what are client funds. ARPC 1.16(d) requires a lawyer to return the unearned portion of an advanced payment of fees upon termination of the representation, but it neither characterizes the advanced payment as property of the client nor addresses whether it should be kept in a client trust account.

Nevertheless, the unmistakable policy behind ARPC 1.15(a) and 1.16(d), together with ARPC 1.5 (all fees must be reasonable), is to ensure that the economic interests of the client are protected. Client trust accounts achieve this by keeping the client's funds from the reach of the lawyer's creditors and from dissipation of unearned fees by the lawyer. The rule requiring return of unearned advanced payment fees protects the client's economic interest in being charged only a reasonable fee, and it also preserves the client's control of settlement and right to end the attorney-client relationship.⁴

Nonetheless, in certain circumstances the client's interests would best be served by being able to prepay for legal services in a manner that allows the client to convey ownership of some or all the funds to the lawyer at the time of the payment, most commonly when the client is funding legal resistance to creditors or government entities seeking forfeiture. In those circumstances a rule requiring prepaid fees to be placed in a client trust account would be contrary to the client's economic interest. Such a rule may also impinge on the client's ability to hire legal counsel and on the willingness of lawyers to undertake such representation. See, Dowling at 1017, 1022. For example, a lawyer taking on a client's case may be required to forego other representations

⁴ See, *Compton v. Kittleson*, 171 P.3d 172, 176-177 (Alaska 2007)(fee agreement construed to ensure client retains control of settlement in attorney-client relationship).

because of potential conflicts or time constraints, so it may be reasonable for a lawyer to require some or all of an advance payment to be denominated as earned (and thus the property of the lawyer on payment) to account for those eventualities. See, ARPC 1.5(a)(2).

The ARPC's lack of specific direction on the question of how flat fees are to be handled indicates some flexibility in allowing for a client's specific needs, so long as the basic policy of client protection is maintained. However, representation in those matters in which it is in the client's interest for flat fees to immediately become the property of the lawyer is only one subset of the many types of cases in which flat fee arrangements are proposed, and the dangers to the client's interests inherent in such arrangements must be minimized consistent with the client protection policies of the ARPC. To ensure the client's interests are protected, flat fee arrangements should be in writing and a client should not be presented with a flat fee arrangement without thorough consultation, which should include the specific reasons for the arrangement, the potential consequences of the arrangement and the client's options.

The Committee concludes that these considerations can be accommodated by requiring that all flat fees be placed into a client trust account to be drawn down when earned, unless after consultation, the lawyer and client agree in writing: (1) that some or all the funds will become the property of the lawyer when paid, (2) that those funds will not be held in a client trust account; (3) that the lawyer and client acknowledge the special purpose of the retainer arrangement; (4) that the client has been advised of the potential consequences of the retainer agreement; and (5) that fees become earned for purposes of a potential refund on some specified basis that will not result in an unreasonably high fee for legal services actually rendered.

Approved by the Alaska Bar Association Ethics Committee on April 5, 2012.

Adopted by the Board of Governors on April 30, 2012.