Advisory Committee of the Supreme Court of Missouri

Formal Opinion 128
(Amended October 24, 2018)

NONREFUNDABLE FEES

Reference Note: Effective January 1, 2019, Rule 4-1.15(c) was repealed and a new 4-1.15(c) was adopted. Effective January 1, 2019, Comments [5] and [6] to 4-1.15 were repealed, and new Comments [5], [6], and [20] were adopted. This Formal Opinion is based on Rule 4-1.15 in effect prior to that date.

This opinion addresses the issue of whether nonrefundable fees are ethically permissible in Missouri.

In many instances, attorneys receive payment before the attorney has completed the services for which the payment is made. In some instances, attorneys refer to these payments as "nonrefundable." These "nonrefundable" fees are often the subject of disciplinary complaints and fee disputes.

Rule 4-1.5 governs attorney fees and subsection (a) establishes the fundamental standard that attorney fees must be reasonable:

> **A lawyer shall not make an agreement for, charge, or collect an unreasonable fee** or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (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.

(emphasis added).

Two types of cases provide good examples of situations in which supposedly nonrefundable fees are involved. The first example is the domestic relations case where the client pays a flat fee or makes an advance deposit on fees against which the attorney will bill on an hourly basis. Sometimes the attorney will describe all or part of the flat fee or initial payment as a "nonrefundable" or "minimum" fee. The second example is the criminal case in which the attorney charges a flat fee and describes the entire fee as nonrefundable.

In these situations, and others, the description of the fee as "nonrefundable" is misleading. Rule 4-1.16(d) requires any fee that has not been earned to be refunded at the end of the representation:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and **refunding any advance payment of fee or expense that has not been earned or incurred.** The lawyer may retain papers relating to the client to the extent permitted by other law.

(emphasis added).

If the representation was completed, the attorney will not be required to refund any of the advance deposit or flat fee, assuming the amount charged was reasonable. However, if the representation ended before the representation was completed, the attorney must analyze the factors set out in Rule 4-1.5(a) to determine the extent to which the attorney must refund all or a portion of the fees paid in advance. In addition, because an attorney may not charge or collect an unreasonable fee, the attorney must determine that the fee was reasonable, even if the representation was completed. Regardless of the terminology used to describe the fee, if the ultimate fee is unreasonable, taking into consideration the eight factors listed under Rule 4-1.5(a), the unreasonable portion must be refunded.

In a domestic relations case, the attorney may have charged a significant fee for initially interviewing the prospective client or taking the case because once the attorney has received enough information it creates a conflict of interest under Rules 4-1.18 or 4-1.9. Once the attorney has sought and obtained information that could be significantly harmful, neither the attorney nor any other members of the attorney's firm may accept representation of the

opposing party or any other party with adverse interests. In other words, an attorney may charge a fee for initially intaking a prospective client or accepting a case, to the extent that it creates a conflict in a situation in which the attorney may have to decline representation of others involved in the case. If the representation terminates after that point, that fee is not accurately described as "nonrefundable;" it is earned. In light of the duty to explain the basis for the fee to the client, the attorney should explain that the fee is earned because of the attorney's inability to represent anyone else in the matter, rather than describing it as nonrefundable. The fee is only earned to the extent that the fee is reasonable in light of all of the circumstances.

Representation in a criminal case may terminate early because the attorney withdraws, the client discharges the attorney, or the prosecution dismisses the charges. In any of these situations, the attorney may owe a refund. The amount of the refund should be based on the reasonable value of the legal services actually provided, taking into account all of the factors listed in Rule 4-1.5(a).

Unless a mixed or hybrid fee arrangement it used, the flat fee should cover the entire representation on the matter. If not, the representation involves limited scope representation under Rule 4-1.2. In that event, the fee agreement must be in writing and must clearly spell out what is and is not covered. For example, if the fee only covers representation of a criminal defendant for negotiating a plea but not for trial, it would involve limited scope representation. Similarly, representation in a dissolution case that only covers a "noncontested" dissolution involves limited scope representation. Representation, in any type of case, that excludes appeal is limited scope representation.

Part of the confusion surrounding this topic may stem from the historical view that a flat fee is earned upon receipt for trust account purposes. However, in the course of reviewing that approach, we have determined that it is not consistent with the current Rules of Professional Conduct. Rule 4-1.15(f) states: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." We believe that all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to prompt removal of earned hourly fees. Flat fees could be removed based upon reaching a particular stage of a case or based on some other reasonable criteria, depending on the nature and circumstances of the representation.[1]

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[1] Reference Note: Effective January 1, 2019, Rule 4-1.15(c) provides that "an advanced flat fee which does not exceed $2,000 is exempted from this requirement and may be deposited into another account." *See also* Rule 4-1.15, Comment [20], providing guidance that advanced flat fees not exceeding $2,000 that are deposited in a lawyer's operating account are subject to refund to the extent the attorney-client relationship is terminated before the advanced flat fee is earned.

We have used the word "fee" rather than "retainer" in this opinion. Historically, a "retainer" was a fee paid simply for the attorney to maintain availability to a client. Currently, the term has taken on many meanings which are inconsistent with one another and which are confusing to clients.[2] We encourage attorneys to avoid using the term retainer when the attorney actually means an advance fee deposit, flat fee, initial deposit, etc. Attorneys best fulfill their duty of communication about fees under Rules 4-1.4 and 4-1.5 when they use plain language that clients are likely to clearly understand.

Jennifer Gille Bacon, Chair

May 18, 2010

Dorothy White-Coleman, Chair

As Amended, October 24, 2018

[2] *See, Dowling v. Chicago Options Associates, Inc.*, 875 N.E.2d 1012, 1018 (IL 2007).