

Opinion 431
June 1986
Tex. Comm. On Professional Ethics, Op. 431, V. 49 Tex. B.J. 1084 (1986)

QUESTION PRESENTED

May an attorney ethically charge a non-refundable retainer?

DISCUSSION

The Supreme Court of Texas, Comm. on Interpretation of the Code of Professional Responsibility, in its opinion Op. 391, issued in 1978, states that an attorney may deposit non-refundable retainer fees into a general operating account because the attorney has "earned" the fee once it is received. As a result thereof, the propriety of using such non-refundable retainer agreements has been presumed. See B. Kazen, *Family Law Texas Practice and Procedure* ¶40.01(3)(e) (1983); J. Compere, "Professional Responsibility and Malpractice," State Bar of Texas Advanced Family Law Course J-34 (1982). However, the law on the issues of fees in general as to attorneys, and especially in relation to the matter of retainer fees, is unsettled and merits further investigation and discussion at this time.

In discussing attorneys' fees in general, Ethical Consideration 2-17 states: The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive costs of legal services would deter laymen from utilizing the legal system and protection of their rights . . .

Ethical Consideration 2-18 further states: A determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved and the results obtained.

It perhaps would be helpful to examine decisions of other jurisdictions in order to establish a consistent rule for Texas practitioners. A New York decision has clearly established that it is improper for an attorney to charge a non-refundable retainer in domestic relations cases. *Volkell v. Volkell*, ABA/BNA Lawyers Manual on Professional Conduct; New York Supreme Court, Queens County, published 7-12-84. The court there held that a non-refundable retainer violates public policy because it discourages early reconciliation and deprives the client of the right to change lawyers without suffering monetary penalties.

Other states have also issued ethical opinions referring to non-refundable retainers outside of the domestic relations context. The Washington State Bar Association issued an opinion in October 1980, which was published in the *Washington State Bar News*. That opinion stated that "a retainer is that non-refundable fee paid by a client to secure an attorney's availability over a given period of time and is not required to be retained in the attorney's trust account since it is considered to be earned by the lawyer at the time of payment. To determine whether the funds of clients should be deposited into the attorney's trust account depends on the agreement reached by the attorney and the client as to whether the funds constitute a retainer or an advance fee deposit." (Op. 173 citing DR 2-110(A)(3), DR 9-102(A)(2)). That opinion goes on to recommend that the attorney have each client sign a written fee agreement in such situations.

A Maryland State Bar Opinion, No. 80-21, echoes the Washington Opinion in this language: "A lawyer or law firm may enter into an agreement with a client which provides for a certain sum

to be paid by the client as a non-refundable retainer. The retainer fee should be reasonable and not clearly excessive. DR 2-106(A)(B), DR 2-110 (A)(3); EC 2-15, EC 2-16, EC 2-17." See also *Baranowski v. State Bar*, 24 Cal. 3d 153, 593 P.2d 613, 154 Cal. Rptr. 752 (1979).

Texas seemingly has no definitive case law regarding non-refundable retainers.

While a non-refundable retainer is not unethical per se, an attorney may be disciplined for refusing to refund an unearned fee (DR 2-110(A)(3)) or for charging a clearly excessive fee (DR 2-106). This seems to present an ethical dilemma which resolves itself into a question of whether a fee is earned and is it excessive?

DR 2-110 requires an attorney to refund any unearned portion of a fee that has been paid in advance when the attorney withdraws from the case, regardless of whether the withdrawal is based upon discharge by the client. Therefore, a non-refundable retainer agreement which allows an attorney to keep the fee despite his withdrawal or discharge from the case may contravene the requirements of DR 2-110. Such an agreement would appear to deny the client's right to discharge the attorney if the client believes the retainer is non-refundable even if he discharges the attorney for cause.

If the "retainer" fee is actually an advance payment for services to be performed, the amount of the fee should be related to the services to be performed. If it is not, the fee may be found excessive. An agreement which is actually an advance payment might provide, for example: "Responsibility to provide legal services will be accepted and work begun when attorney receives \$_____ as an advance retainer against the fees and expenses." *Kazen*, supra ¶40.03F(2), at 40-58. In such a case, if the client discharges the attorney for cause, that part of the fee which has not been earned must be refunded. See ABA Comm. on Professional Ethics, Informal Op. 988 (1967) (a non-refundable retainer should only be kept if it is earned). However, a lawyer's unique experience which must be necessary to the trial of a particular case may be considered as a factor in evaluating the reasonableness of the fee.

A true retainer, however, is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment. 7A C.J.S. Attorney and Client ¶282 (1980). If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. If, however, the client discharges the attorney for cause before any opportunities have been lost, or if the attorney withdraws voluntarily, then the attorney should refund an equitable portion of the retainer.

An analysis of the above authorities indicates that Texas Ethics Opinion 391 is still viable, but is overruled to the extent that it states that every retainer designated as non-refundable is earned at the time it is received. A fee is not earned simply because it is designated as non-refundable. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney's account. However, if the attorney is discharged for cause, or voluntarily withdraws before opportunities have been lost, DR 2-110 imposes a duty upon the attorney to promptly refund an equitable portion of the retainer.

CONCLUSION

A retainer fee is a payment to compensate an attorney for his commitment to provide certain services and forego other employment opportunities. Non-refundable retainers are not inherently unethical, but must be utilized with caution. Such agreements pose at least three potential problems: 1. Interference with the client's right to discharge the attorney if the client fears the

retainer will be forfeited under any circumstances. 2. If the attorney's action causes the value of the retainer to be reduced and he is discharged for cause or voluntarily withdraws, an equitable portion of the retainer should be refunded to the client. 3. The fee may be excessive if not determined by relevant factors such as the degree of likelihood that other employment will actually be precluded, and the experience, reputation and ability of the lawyer. See DR 2-106.