

## PRACTICE TIPS FROM BAR COUNSEL

# CAN FLAT FEES BE NON-REFUNDABLE? ONLY IF THE FEE IS REASONABLE.

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Last month's column discussed an attorney's options when facing a non-paying client. Given the headaches associated with collection activity against a client, many attorneys opt instead to perform legal services on a flat-fee basis.

Even flat fees, however, can become problematic when the attorney-client relationship ends prior to the client's matter being completed. And, depending on how the fee agreement is drafted, disputes may arise regarding whether the attorney fulfilled all of his or her obligations to the client.

In the first possible scenario, the client often seeks a partial refund because the attorney did not complete his or her matter. Problems arise when the attorney believes no refund is warranted because the matter was accepted on a flat-fee basis. In fact, the fee agreement may even spell out that the retainer is non-refundable. This argument, however, is flawed.

The flaw is that a flat fee cannot be *per se* non-refundable. Attorney fees are required to be reasonable pursuant to RPC 1.5 (Fees). Although the reasonableness of a fee is determined on a case-by-case basis, the rule offers several criteria to be considered in considering the reasonableness of an attorney fee:

- (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, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (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.

When attorneys contact our office regarding a dispute over a flat fee, whether in response to a bar complaint or by an ethics call, they tend to defend the work they performed in earning their non-refundable fee. Frequently, they provide billings indicating that the services provided far exceeded the flat fee amount they received. In one instance, the attorney was retained on Christmas Eve and had to have the work completed by New Year's Day.

The attorney may be unaware that, in making these arguments, they're arguing to the merits of the fee being earned, rather than justifying a "non-refundable" retainer solely because of its label. Cases dealing with non-refundable fees always find that an attorney is not permitted to keep fees solely by deeming them non-refundable.<sup>1</sup> The attorney, in order to keep the funds, must always establish that the fee was reasonable, given the circumstances of the case.

Thus, if your client fires you before the conclusion of representation, and you believe that you are entitled to keep the entire flat fee, make sure that you can articulate reasons as to why the fee was earned.

Flat-fee agreements can also go awry when the scope of the representation is ambiguous. For example, our office recently received an ethics call from an attorney who agreed to file an opposition for a client and appear at the hearing for the motion on a flat-fee basis. The attorney drafted and filed the pleading, prepared for and appeared at the hearing. However, through no fault of the attorney, the hearing was continued.

The attorney believed he had performed as agreed upon – he had written the opposition and attended the scheduled hearing. As such, he requested that the client pay an additional fee for him to appear at the new hearing date. The client, however, believed that the attorney had yet to complete the second part of the contract, namely handle the hearing in the matter.



The problem was that the attorney viewed the agreement as two discrete actions: namely, file an opposition and then appear at a certain date and time for a hearing. The client viewed the arrangement as the attorney agreeing to handle the issue from beginning to end.

Clients, not generally being experts at law, tend to view a flat-fee retainer as the attorney handling an issue from beginning to end. The attorney, on the other hand, understands, particularly in litigation, that a case can take any number of turns.

As such, any type of flat-fee agreement should be reduced to writing, even if it is not specifically required pursuant to RPC 1.5, as it establishes the work is being performed for the fee. A good agreement will indicate what services are covered by the flat fee; a better agreement will anticipate contingencies and, if necessary, note what services are not covered by the fee.

A client may not like the fact that the opposing party may file a motion to reconsider, or that a hearing date may get continued. But if the fee agreement notes that more than one pleading or hearing may ultimately be necessary, and that an additional fee would be required in such an event, the client will understand, even if he or she is not thrilled.

In summary, my experience reviewing bar complaints with flat-fee agreements indicates that attorneys often go beyond the work specified by agreement, especially when a client is tight on funds. That constitutes a good reason to deem the fee earned and therefore “non-refundable.” However, a flat fee is not non-refundable solely because the agreement says so.

Lastly, most misunderstandings regarding the scope of a flat-fee agreement can be avoided if the contract is reduced to writing and notes both the services that are covered as well as those that are not included. **NL**

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<sup>1</sup> See, e.g., *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004); see also *In re Sather*, 3 P.3d 403 (Colo. 2000); *In re Mance*, 2009 WL 3028236 (D.C.).

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