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## Opinion No. 701, May 2024

### QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to offer legal services under a subscription service fee model in which the client pays a monthly fee for legal services that the client may or may not utilize? If the Rules permit such an arrangement, must the lawyer keep the fees paid by the client in the lawyer's trust account until the end of each month and make an appropriate refund upon termination?

#### STATEMENT OF FACTS

Looking to capitalize on the success of subscription fee services in other industries, a lawyer wants to offer legal services by subscription. Subscription clients will pay a monthly subscription fee to the lawyer. Subscription plans currently in use by lawyers offer a wide variety of services. For example, a lawyer may offer general counsel services to startups and nonprofits; corporate document review; 30-minute sessions with a lawyer each month; a specified number of attorney hours each month; and discounted legal fees for more complex matters.

In this example, the lawyer offers a subscription plan that provides each client a specified number of hours of legal services per month, plus templates of legal forms and weekly or monthly check-in calls with the lawyer. The monthly subscription price is significantly lower than the specified number of hours of legal services would otherwise cost at the lawyer's usual rate. The lawyer agrees to provide additional legal services at a 10% discount. The client acknowledges that the lawyer is not obligated to perform the services if the lawyer has a conflict of interest or other professional limitation regarding the client's matter.

The subscription contract provides that the monthly fee is due in advance. Further, the monthly fee is owed even if the client does not use all allotted services during the month. In such a case, no portion of the monthly fee will be refunded to the client and fees will not roll over to be applied to future legal services. The subscription contract also states that the client may cancel the

contract at any time, but if the client cancels the subscription in the middle of the month the lawyer may retain the entire monthly subscription fee for the month.

#### DISCUSSION

##### A SUBSCRIPTION FEE MUST NOT BE UNCONSCIONABLE.

Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct states that "[a] lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." The rule provides several nonexclusive factors a lawyer may consider in determining the reasonableness of a fee. *See* Rule 1.04(b).

Whether a particular subscription fee agreement is unconscionable is a question of fact, but there is nothing inherently unconscionable about a subscription fee. A subscription fee may provide a reduced hourly rate, "on-call" availability, and other benefits. The value of these benefits should be weighed against the cost of the monthly fee, the risk that the client may not need the allotted amount of legal services, and the risk that the lawyer may not be able to provide the requested services due to a conflict of interest, a lack of expertise, or some other professional limitation. There is no question that, for some clients in some circumstances, a subscription fee agreement may be advantageous and desirable.

For example, if a small business

client is likely to need a variety of legal services over the course of a year, a subscription fee arrangement could offer significant value and cost stability. Even if the client does not need legal services in some months, the client may come out ahead financially over the course of the year. The client may also appreciate an "on-call" relationship with a lawyer and the predictability of a fixed monthly fee.

By comparison, in some circumstances a subscription fee agreement may be unconscionable. For example, a monthly subscription fee agreement between a family lawyer and a client who has no spouse or children, and who therefore is unlikely to need the lawyer's services, may be considered unconscionable. A lawyer should evaluate the reasonableness of a subscription fee arrangement based on each client's circumstances, including whether the client is likely to use the services offered.

Rule 1.04(a) prohibits charging or collecting an unconscionable fee, even if the arrangement with the client does not call for an unconscionable fee at the outset of the attorney-client relationship. Accordingly, a lawyer should periodically reevaluate the subscription fee engagement. Even if a subscription fee is reasonable at the outset of the attorney-client relationship, the fee may become unconscionable over time. A subscription fee might become unconscionable if the client rarely or never uses the lawyer's services. It also might become unconscionable if a client develops a diminished capacity that

prevents the client from understanding or remembering the nature of the subscription fee arrangement.

**A SUBSCRIPTION FEE MUST BE KEPT IN TRUST UNTIL THE END OF THE PAYMENT PERIOD.**

The Committee previously opined that a lawyer's fee may be non-refundable "only if the fee *in its entirety* is a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client." Professional Ethics Committee Opinion 611 (Sept. 2011) (emphasis added). Under Opinion 611, any other fee advances—such as fixed fees advanced to pay for future services—may not be treated as non-refundable and generally must be retained in the lawyer's trust account until the services are provided. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 505 (2023) ("Fees Paid in Advance for Contemplated Services").

As defined in this opinion, a subscription fee agreement is tantamount to a periodically recurring fixed fee agreement. Although some of the subscription fee may be attributable to ensuring the lawyer's availability, and,

thus, may be deemed earned upon payment, the fee also pre-pays for a specified number of hours of legal services. Because the fee is not *entirely* paid to secure the lawyer's availability and compensate for the preclusion of other employment, the unearned portion of the fee cannot be non-refundable. As a result, a lawyer must keep subscription fees that merely entitle the client to legal services segregated from other fees until the conclusion of each fee period. At the end of the fee period, the fee may be moved from the lawyer's trust account and taken into income.

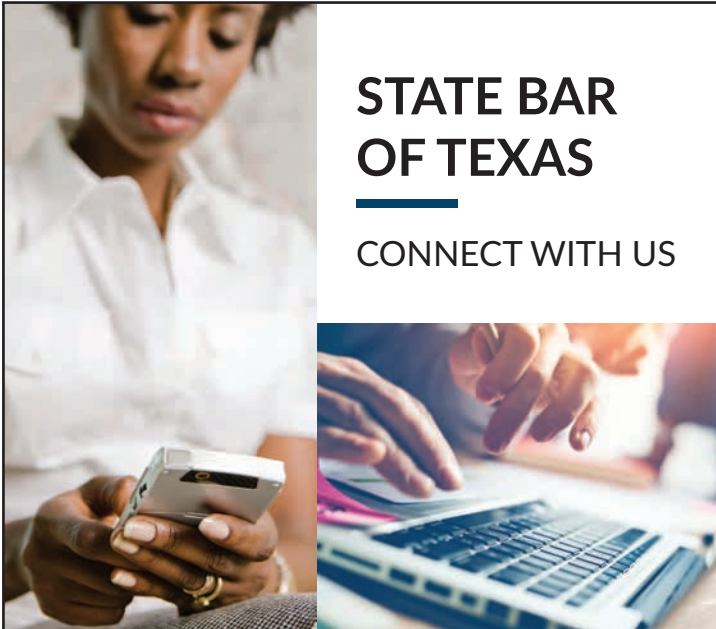
**UPON TERMINATION OF A SUBSCRIPTION FEE ARRANGEMENT, THE LAWYER MUST REFUND ANY UNEARNED PORTION OF A PREPAID SUBSCRIPTION FEE.**

As with any lawyer-client relationship, the client may terminate the representation at any time, even if the representation involves a subscription fee arrangement. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006) ("Public policy strongly favors a client's freedom to employ a lawyer of his choosing and, except in some instances where counsel is appointed, to discharge the lawyer during the representation for any reason or no reason at all."); Comment 4 to Rule 1.15 ("A client has the power to

discharge a lawyer at any time, with or without cause ..."). A contract provision that forfeits the entire subscription fee at the beginning of the month violates the principle, articulated in Opinion 611, that a lawyer may not contract for a "non-refundable fee" except when the fee is entirely paid to secure the lawyer's availability and compensate for the preclusion of other employment. When the client cancels the subscription service before the end of the month, the lawyer must refund an appropriate portion of the subscription fee.

**CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may enter into a subscription fee agreement with a client, and charge and collect a subscription fee under that agreement, if the fee is not unconscionable under the circumstances. A lawyer should ordinarily retain subscription legal fees in the lawyer's trust account until the end of the recurring subscription period. A contract provision forfeiting the entire amount of a monthly subscription fee if the subscription is cancelled before the end of the month is impermissible. **TBJ**



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