



When Is A Retainer Truly Non-Refundable?

By Cynthia Canfield Hamilton

Whether an attorney may consider an advance fee to be non-refundable depends upon two equally important factors — the circumstances of the representation and the attorney’s explanation of the fee to the client. Most attorneys recognize the importance of utilizing written fee agreements that clearly spell out the terms of their fees. Thus, many attorneys require that their clients sign representation agreements that include detailed fee schedules. However, many attorneys are surprised to learn that the circumstances under which a non-refundable retainer may be charged are limited. Both a court of appeals and the Professional Ethics Committee have provided guidance to practitioners in this area.

There must be a likelihood of lost opportunities for other employment.

In a recent opinion, the Ethics Committee addressed whether it would be permissible for an attorney to enter into an agreement with a client providing for the client to pay the attorney, at the outset of the representation, a “non-refundable retainer” that would cover the attorney’s services up to the time of trial.¹ To answer the question, the committee considered the prohibition against unconscionable fees set forth in Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct. The committee also considered two prior ethics opinions regarding non-refundable retainers.

Based on Opinion 391 (1978) and Opinion 431 (1986), the committee determined that a non-refundable retainer (also called a “true retainer”) is a payment to secure an attorney’s availability and compensate the attorney for the loss of

other employment opportunities. To pass muster under Rule 1.04(a), a non-refundable retainer must constitute “reasonable” compensation for the likelihood that other employment oppor-

tunities will be lost once the attorney commits to the representation. Therefore, an attorney may charge a client a non-refundable retainer *only if* other employment opportunities are likely to be lost as a result of the attorney’s representation of the client.

Opinion 611 emphasizes the distinction between a payment to secure an attorney’s services and a payment for services to be rendered. In this sense, a non-refundable retainer is solely for the *availability* of future services rather than the *provision* of future services.

Opinion 611 also reiterates the committee’s previous warning that non-refundable retainers, though not inherently

unethical, must be used with caution. And it notes that even a non-refundable retainer might have to be refunded under

All in all, an attorney must never lose sight of his or her responsibility to protect the client’s interest, even when a fee agreement is being negotiated. Before charging an advance fee that is intended to be “non-refundable,” an attorney should carefully consider whether the circumstances are appropriate for a non-refundable retainer.

unusual circumstances, such as where an attorney is discharged for cause after receiving the retainer but before he or she actually loses other employment opportunities.

The committee concluded that an attorney may not enter into an agreement for a client, at the outset of representation, to pay a “non-refundable retainer” that includes payment for the lawyer’s services up to the time of trial.

The attorney must clearly communicate with the client regarding fee arrangement terms.

Opinion 611 refers to the only decision from a Texas court of appeals to directly address non-refundable retainers in the disciplinary context. In *Cluck v. Commission for Lawyer Discipline*,² the court considered whether an attorney violated the disciplinary rules by failing to deposit a fee denominated a “non-refundable retainer” in his trust account. The trial court had granted summary judgment in favor of the Commission, and the court of appeals affirmed the summary judgment, relying heavily on Opinion 431.

Like Opinion 611, the *Cluck* decision demonstrates that both prongs of a two-part analysis must be carefully considered to determine the propriety of a non-refundable retainer. That is, the circumstances of the representation, as well as the attorney’s communication with the client regarding the nature of the fee, must be considered.

The respondent attorney in *Cluck* ran afoul of the disciplinary rules both because the fee he charged was in the nature of a prepayment for the *provision* of legal services and because he was unclear in his communications with his client regarding the fee. The court noted that the attorney’s contract failed to state that the client’s advance payment compensated him for his availability or lost opportunities. Instead, the contract stated that the attorney would bill his hourly fee against the advance payment.

In addition, the attorney charged the client a second “retainer” to resume work on the client’s divorce. The court found that if the initial payment had actually secured the attorney’s availability, a second “retainer” would have been unnecessary.

Finally, the court in *Cluck* rejected the attorney’s argument that he had properly described the fee as a non-refundable retainer in the contract and, therefore, he did not have to deposit the client’s payment into his trust account. The contract had specifically stated that the client agreed to pay the attorney a non-refundable retainer of \$15,000. The contract had also stated that “no part of the legal fee [would] be refunded” “should the case be discontinued, or settled in any other matter [sic].”

In rejecting the attorney’s argument, the court stated, “A fee is not earned simply because it is designated as non-refundable.” In fact, the *Cluck* opinion twice quotes this directive from Opinion 431.

The client must agree to the terms of the fee arrangement.

Opinion 611 refers to an additional criterion for a non-refundable retainer — that the client must agree to it. The opinion does not expound on this requirement. However, it goes without saying that written fee agreements are indispensable, especially if a fee arrangement diverges from traditional fee structures. An attorney has a duty to ensure the client understands the terms of the representation, including fee arrangements.³ So any attorney who ventures to charge a non-refundable retainer without a written fee agreement is taking a substantial risk.

All in all, an attorney must never lose sight of his or her responsibility to protect the client’s interest, even when a fee agreement is being negotiated. Before charging an advance fee that is intended to be “non-refundable,” an attorney should carefully consider whether the circumstances are appropriate for a non-refundable retainer. If the attorney determines that an advance fee would be reasonable compensation for the likelihood of lost employment opportunities, the attorney may charge a non-refundable retainer. But the attorney must take care to communicate clearly with the client regarding the retainer and ensure the client understands and unambiguously agrees to the fee’s non-refundable nature.

Notes

1. Tex. Comm. on Prof’l Ethics, Op. 611, 2011 WL 5831792.
2. 214 S.W.3d 736 (Tex. App. — Austin 2007, no pet.).
3. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006); see also *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001) (emphasizing attorney’s duty to inform client of basis or rate of fee at outset of representation); *Lopez v. Munoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 867–68 (Tex. 2000) (Gonzalez, J., concurring and dissenting) (discussing attorney’s duty to “fully and honestly inform his or her client of a fee arrangement”).

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