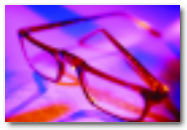

Nonrefundable Fees Trouble With a Dollar Sign

Pity Ohio lawyer Kim Halliburton-Cohen. She was suspended from the practice of law by the Ohio Supreme Court for charging a nonrefundable "lost opportunity" fee to a client attempting to terminate her marriage.[1] The fee agreement provided for an hourly rate of $250 and an initial retainer of $3,500, $1,500 of which was "assessed" to the client for "the lost opportunity cost to the attorney for her immediate and permanent inability to represent any other party in the case."

The Ohio Supreme Court was surprised to find out that the client's husband already had his own lawyer when the fee agreement was signed, and determined that Ms. Halliburton-Cohen's "lost opportunity" did not really amount to anything at all. When she was unable to show time charges that she had performed $1,500 worth of work and still refused to return the fee, she was disciplined under Ohio's ethical rule prohibiting lawyers from charging clearly excessive fees.[2]

That lawyer fared much better, however, than Arizona's own Robert Hirschfeld, who was disbarred for, among other things, charging nonrefundable retainers under fee agreements that stated "The initial retainer is earned upon receipt and is nonrefundable."[3] In one case, Mr. Hirschfeld charged a nonrefundable retainer of $8,000 in a divorce case and refused to return it when his client and his wife reconciled two days later. The Supreme Court found this and other behavior attributed to the lawyer to be in violation of former ER 1.5's command that "a lawyer's fee shall be reasonable."[4] Citing its previous holding in *In re Swartz*, the Court stated that the legal profession is "a branch of the administration of justice and not a mere money getting trade."[5]

Ethics Opinions are available at www.myazbar.org/Ethics

Nonrefundable retainers have made for a lot of trouble over the years, mainly for lawyers. New York has simply prohibited them in domestic relations matters.[6] One of the most frequently heard criticisms of the practice is that it impairs the client's nearly absolute right to terminate a lawyer's services by imposing a financial penalty on the client for exercising it.[7] Other courts have simply set nonrefundable retainers aside as the charging of a fee without doing the work.[8]

Since December 1, 2003, Arizona's new ER 1.5 is very clear on the subject. It states, in pertinent part, that:

> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> ...
>
> (3) a fee denominated as "earned upon receipt", "nonrefundable" or in similar terms unless the client is *simultaneously advised in writing* that the client may nevertheless discharge the lawyer at any time and in that event *may be entitled to a refund of all or part of the fee* based upon the value of the representation pursuant to paragraph (a)." [Emphasis supplied]

Paragraph (a) of ER 1.5 carries over essentially verbatim the criteria of old ER 1.5 for determining what is a reasonable fee—for example, the time and skill required as well as the difficulty of the questions involved; the likelihood that other employment will be precluded; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed upon the lawyer by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience and ability of the lawyer; and the degree of risk assumed by the lawyer in taking the case.

The Arizona Supreme Court will probably continue to hold that nonrefundable retainers are not per se violations of ER 1.5[9] and that they may be appropriate under certain circumstances.

What could these circumstances be? The requirement of large startup and staffing costs in complex litigation may justify a nonrefundable advance.[10] So too where a sophisticated business client wishes to prevent any other of its competitors from using a lawyer's services in anticipated litigation, in effect disqualifying the lawyer from other work.[11] In short, there are reported cases upholding, as "earned," nonrefundable retainers, mostly in the commercial law context.[12]

New ER 1.5(d) requires Arizona lawyers to be very careful about charging a nonrefundable retainer and to be prepared to return, at the end of the representation, any unearned fees that do not pass muster under the criteria set forth in ER 1.5(a)(1)–(8).

David D. Dodge is a partner in the Phoenix law firm Lieberman, Dodge, Gerding & Anderson, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

endnotes

1. *Columbus Bar Association v. Halliburton-Cohen*, 106 Ohio St. 3d 98 (Ohio 2005).
2. DR 2-106A, Code of Professional Conduct, which was in existence in Arizona prior to Aug. 2, 1983.
3. *In re Hirschfeld*, 960 P.2d 640 (Ariz. 1998).
4. Rule 42, ARIZ.R.S.CT.
5. 686 P.2d 1236, 1243 (Ariz. 1984).
6. *In re Cooperman*, 633 N.E. 2d 1069 (N.Y. 1994).
7. *See* HAZARD & HODES, THE LAW OF LAWYERING § 8.5 (2003); ROTUNDA & DZIENKOWSKI, LEGAL ETHICS § 1.5-1(e) (ABA Center for Professional Responsibility 2005-2006).
8. *FSLIC v. Angell, Holmes & Lea*, 838 F.2d 395 (9th Cir. 1988), *cert. denied*, 488 U.S. 848; *In re Gastineau*, 857 P.2d 136 (Or. 1993); *Matter of Dawson*, 8 P.3d 856 (N.M. 2000).
9. *In re Hirschfeld*, 960 P.2d at 643.
10. *Atkins & O'Brian LLP v. ISS Int'l Serv. Sys. Inc.*, 678 N.Y.S.2d 596 (N.Y. App. Div. 1998).
11. HAZARD & HODES, *supra* note 7, § 8.5.
12. *See* cases collected in ROTUNDA & DZIENKOWSKI, *supra* note 7, n.26.