

DOMESTIC RELATIONS – LEGAL
FEES: PROPRIETY OF EMPLOYMENT
AGREEMENT REQUIRING CLIENT TO
PAY A NON-REFUNDABLE RETAINER
AND THE ATTORNEY TO RETAIN THE
WORK PRODUCT UPON
TERMINATION OF EMPLOYMENT.

You have asked the Committee to consider the propriety of a proposed employment agreement which shall be used solely for domestic relations matters, specifically, separation and/or divorce, and no other legal matters.

The Committee first considered the provision in the contract which requires the client to pay upon execution of the agreement a retainer to be designated by the attorney and agreed upon by the client. The contract provides that the retainer is made to insure the availability of attorney to the client and as such shall be deemed the property of attorney as consideration for attorney's unavailability to the potential adversary party. The contract further states that the retainer is non-refundable but will be credited against the overall fee and costs incurred in the representation. The contract also states that additional retainers may be required from time to time if attorney deems it necessary, notwithstanding that a retainer will be required once the matter has been set for hearing before a commissioner.

In the view of the Committee, payment of a retainer by a client to an attorney to insure the attorney's availability and as consideration for his unavailability to a potential adverse party is proper where the client seeks to secure the attorney's employment for representation of his interests in any matter which may arise in the future. The Committee has previously opined that a retainer or periodic payment to insure the availability of a specific lawyer or law firm *at any given time in the future* is not violative of the Code of Professional Responsibility. (emphasis added) (See LE Op. 1178) In contrast, a specific sum paid at the time an employment agreement is entered into between a lawyer and the client to secure the lawyer's legal services for a specific domestic matter, for example, is deemed to be an advanced legal fee which has been entrusted to the lawyer. Such advanced fees have been properly deemed the property of the client except for that portion which may be considered the property of the lawyer or law firm which may be withdrawn when due, unless the lawyer or law firm's right to receive it is disputed by the client. (See DR:9-102(A)(2) and LE Op. 1178)

Furthermore, the Committee believes that in order to comply with DR:9-102, the lawyer must properly deposit such advanced legal fees in one or more identifiable bank accounts, in a bank licensed to do business in Virginia; the client must be promptly notified of the receipt of his funds, securities or other properties; and the records must be properly maintained and the client provided with an appropriate accounting as funds are deposited or withdrawn. A lawyer shall, upon request, deliver to the client or his designee the funds, securities or other property in the possession of the lawyer. Thus, the Committee is of the view that the use of the term "non-refundable retainer," as in the proposed employment contract, is a misnomer where the intent is to insure the availability of the attorney and is deemed the property of attorney as consideration for his unavailability to the potential adversary party in a specific matter. The Committee further opines that the immediate deeming of such an advanced legal fee as the property of the attorney is improper. (See DR:9-102(B)(4), DR:2-108(D), LE Op. 1178, LE Op. 1132, LE Op. 936 and LE Op. 585)

In addition, the Committee considered the proposed contract provision where the attorney's right to terminate services and retain any work product in the event any statement remains unpaid for thirty (30) days or more. The Committee has defined an attorney's "work product" as items purchased by the client by the payment of legal fees. Thus, to the extent that the client has advanced any funds which may be credited toward attorney's legal fees, any "work product" generated as a result of such legal services is considered to be the property of the client. (See LE Op. 1171)

The Committee directs your attention to DR:2-108(D) which provides in part that a lawyer may retain papers of the client to the extent permitted by applicable law. Foremost, upon termination of representation, the Disciplinary Rule requires a lawyer to take reasonable steps for the continued protection of a client's interest, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The Committee has previously opined that, even if applicable law permits the attorney to retain papers relating to the client, such withholding may be inconsistent with taking "reasonable steps for the continued protection of a client's interest." (See LE Op. 1178)

Thus, the Committee believes that the term "non-refundable retainer" as it is used in the instant employment contract is improper since funds which are entrusted to a lawyer by a client for the lawyer's services on a specific matter are deemed to be "advanced legal fees." While such advanced fees are the property of a client, an attorney is entitled to withdraw a portion of the funds due as legal services are rendered. A lawyer in possession of such advanced legal fees is required to strictly comply with the Disciplinary Rules regarding preserving the identity of funds and property of a client. Also, the Committee would caution against the use of a provision such as that used in the proposed contract which provides for automatic retention of any "work product" as it may be perceived to be inapposite to an attorney's obligation to continue to protect his client's interests.

Committee Opinion
February 27, 1990