

Committee Opinion

June 1, 1989

LEGAL ETHICS OPINION 1246

FEES – TRUST ACCOUNT:
RESOLUTION OF INITIAL RETAINER
PAID TO ATTORNEY AFTER BEING
DISCHARGED BY CLIENT.

You advised that Law Firm X was retained to review a possible case for which the firm received \$500 from Client A. Client A did not wish to proceed in the manner in which Law Firm X was prepared to act and, because of time constraints, Law Firm X and Client A did not enter into a written agreement of employment. Now Client A has taken the position that the \$500 was not paid simply for review of the case, but was instead a retainer toward a larger fee or retainer which Law Firm X would have received had the firm agreed to take the case on the client's terms. However, Law Firm X is of the view that the amount charged was for the initial review with no assurances regarding the outcome of that review. This is the standard practice of the firm and is usually set out in a letter to the prospective client. Therefore, ever since Client A's request for a refund of the \$500, Law Firm X has retained the money in escrow in a trust account. In addition, the firm offered Client A three alternatives to resolve this dispute: (1) a refund of \$100 in exchange for a full release; (2) fee arbitration; and (3) Law Firm X's payment for Client A to consult with a lawyer referred by a local bar referral service, with the provision that the client accept that lawyer's decision as to whether she is entitled to a refund.

Client A rejected all three of the proposals and Law Firm X wishes to know whether it is ethically bound to retain the money indefinitely in escrow if the client is not amenable to some resolution other than the entire refund.

The Committee believes the appropriate and controlling rule relative to your inquiry is DR:9-102(A)(2), which provides that funds of a client paid to a lawyer or law firm, other than advances for cost and expenses, shall be deposited in one or more identifiable bank trust accounts maintained in the state in which the law office is situated; that where part of the funds belong to the client and in part presently or potentially to the lawyer or law firm, the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. Furthermore, DR:9-102(B) provides that a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and he shall promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive. (See DR:9-102(B)(3) and (4))

The Committee has previously opined that a "retainer" or "guaranteed minimum fee" made as a prepaid fee for specific services to be rendered in the future, should be placed in a trust escrow account and paid over to the attorney's general account only as services are rendered in accordance with DR:9-102. The Committee further opined that it is the duty of an attorney to refund any portion of a retainer fee which has not been earned by performance of the services for which the attorney was retained. (See *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958 (1977) and LE Op. 510, LE Op. 646, and LE Op.

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1178) In addition, LE Op. 681 states that a lawyer is required to account to his client, upon request, for all or any part of a fee paid for services to be rendered in the future. Thus, an attorney who is paid a substantial portion of an agreed fee in a criminal matter and whose services are terminated prior to the conclusion of that matter must, upon demand by his client, provide an accounting of fees received and expended which fees must be reasonable.

In the Committee's view, the only proper and ethical course of action to resolve a fee dispute between an attorney and his client is to retain that portion in dispute by the client in a trust account, after rendering an accounting to the client of the amounts earned and returning any refund due the client, until the matter can be resolved by the appropriate legal means. The Committee also directs your attention to EC:2-25 which provides in part that a lawyer should be zealous in his efforts to avoid controversy over fees with his clients and should attempt to resolve amicably any differences on the subject.

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