

Inquiry: Because a number of existing opinions pertaining to fee arrangements are sometimes inconsistent or incomplete in the description and definition of those arrangements, this Committee has chosen to review existing opinions and issue a compendium opinion discussing the propriety of fee arrangements. Some of the issues the Committee has decided to consider include the various types of fee arrangements, when the fee is the property of the client and when it can be considered the property of the attorney, and when and under what circumstances a client is entitled to a return of fees paid to an attorney. Specifically, the Committee has chosen to address the following types of legal fees:

Retainers

Advanced Legal Fees

Non-refundable Legal Fees (“Non-refundable Retainers” or “Minimum Fees”)

Fixed Fees

Contingent Fees

Applicable Disciplinary Rules: The appropriate and controlling disciplinary rules relevant to the questions raised are:

DR:2-105(A) which requires that a lawyer's fees be reasonable and adequately explained to the client.

DR:2-105(B) which requires that upon request a lawyer shall furnish to the client the basis or rate of the lawyer's fee.

DR:2-105(C) which permits (with exceptions) a fee contingent on the outcome of a matter for which the service is rendered.

DR:2-108(A)(3) which requires a lawyer to withdraw from representing a client if the lawyer is discharged by the client.

DR:2-108(D) which requires that upon termination of representation a lawyer shall refund any advance payment of fees that has not been earned.

DR:9-102(A) which requires a lawyer to deposit all funds received on behalf of a client, except reimbursement of costs and expenses, in a separate identifiable account which does not contain funds belonging to the lawyer.

DR:9-102(A)(2) which permits the lawyer to deposit into the trust account funds which belong in part to the client and in part presently or potentially to the lawyer. The portion

belonging to the lawyer must be withdrawn when earned unless the right to receive it is disputed by the client.

DR:9-102(B)(4) requiring a lawyer to promptly pay or deliver to the client or another all funds in the possession of the lawyer which the client is entitled to receive.

Prior Legal Ethics and Court Opinions: The following opinions and court cases have dealt with the issue of legal fees:

Legal Ethics Opinions: LE Op. 189, LE Op. 214, LE Op. 510, LE Op. 528, LE Op. 568, LE Op. 646, LE Op. 681, LE Op. 1062, LE Op. 1246, LE Op. 1322, LE Op. 1370,

Case Law: *AFLAC, Inc. v. Williams*, 1994 Ga. LEXIS 466 (Ga. 1994); *County of Campbell v. Howard*, 133 Va. 19 (1922); *In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991); *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y. 1994); *Wood v. Carwile*, 231 Va. 320 (1986).

Opinion: 1. Fees in General. An analysis of legal fees begins with the proposition that contracts for legal services are not construed as are other commercial contracts. Citing with approval *Drippner v. Mutz*, 205 Minn. 497, 287 N.W. 19 (1939) the Virginia Supreme Court has noted:

It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 962 (1977).

The Disciplinary Rules set certain restrictions on all legal fees that cannot be avoided by the employment contract. Regardless of the agreed terms, the designation of the fee in the employment contract cannot alter the true nature of the fee and will not be dispositive in determining whether there is a violation of the Disciplinary Rules. Neither will the terminology used to describe the fee determine whether the fee has been earned by the lawyer or into which type of account the fee must be placed. LE Op. 510. A lawyer cannot by contract alter the nature or the ownership of fees received, nor can he legitimize a fee that is otherwise prohibited by the Disciplinary Rules.

DR:2-105 directs that a lawyer's fees be adequately explained to the client, and that the basis of the fee be furnished to the client. EC:2-21 suggests that there be a clear agreement as to the basis of the fee as soon as feasible after a lawyer has been employed. It also encourages the use of written contracts of employment as the preferred means of complying with the requirement of DR:2-105. A lawyer must, upon request, furnish to his client an itemized breakdown of legal fees, costs and related expenses paid by that client. LE Op. 214.

All fees must be reasonable. DR:2-105(A). In determining the reasonableness of the fee, one may take into account the lawyer's experience, ability and reputation, the nature of the

employment, the responsibility and effort involved and the results obtained. EC:2-20. It is also proper to consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991).

The Committee has previously opined that the fact that a fee is stated and agreed to in a contract is not dispositive of whether it is reasonable under the Code of Professional Responsibility. LE Op. 528. It is also important to note that because of the unique nature of the legal contract, a determination of the reasonableness of the fee is not necessarily limited to the circumstances which existed at the time of the agreement. The occurrence of unusual or extraordinary events not contemplated by the parties at the outset of the representation may effect the ultimate reasonableness of the agreed upon fee.

A client retains the absolute right to discharge the lawyer at any time for any reason or without reason. Disciplinary Rule 2-110 imposes no restriction or condition on the client's right to discharge his lawyer. Even when the discharge constitutes a breach of the employment contract, the lawyer is entitled only to that portion of the fee that has been actually earned prior to the termination. LE Op. 681. When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in *quantum meruit* for services actually rendered. *Heinzman, supra*. The *quantum meruit* determination must look to the reasonable value of the services rendered, not to the benefit received by the client. *Wood v. Carwile*, 231 Va. 320 (1986); *County of Campbell v. Howard*, 133 Va. 19 (1922).

Finally, if the lawyer is discharged by the client, he must refund to the client all advanced legal fees which have not been earned. DR:2-108(D).

2. Retainers. This Committee has on several occasions addressed the unique features of a retainer. The Committee is mindful, however, that the term is probably misused more often than not (a fault for which the Committee must accept some responsibility), to describe any type of advanced legal fees. As the Committee opined previously in LE Op. 1322, a retainer (or advance periodic payment) is a payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future. A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees. A retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a matter which may arise in the future. This Committee has previously opined, and continues to believe that a retainer is not violative of the Disciplinary Rules. LE Op. 1178.

The Committee is further of the opinion that because retainers are paid to secure the availability of an attorney in the future, and not as payment for future legal services, retainers are earned when paid and become the property of the attorney upon receipt. Such fees are deemed earned by the lawyer at the time of payment in consideration for the lawyer's availability to the client and unavailability to potential adverse parties. LE Op. 1178. Because retainer fees are the property of the lawyer when paid, they may not be deposited into the attorney's trust account. DR:9-102(A).

The Committee recognizes that it is common practice for lawyers to accept fees described as retainers to secure the lawyer's future availability and agree to credit those fees against legal services to be provided in the future. The Committee is of the opinion that while such an arrangement is not improper, if the employment agreement provides for fees, regardless of their designation, to be applied against future services to be rendered by the attorney, the fee is not a retainer, but rather an advanced legal fee and must be handled as discussed below. LE Op. 510.

LE Op. 1178, LE Op. 1322 and LE Op. 1370 properly define and distinguish the terms “retainer” and “advanced legal fees”. As noted previously, however, various other opinions have used the term “retainer” in a generic sense which often is inconsistent with its true meaning. Accordingly, to the extent, and only to the extent, that previous opinions, including LE Op. 186-A, LE Op. 558, LE Op. 646, LE Op. 681, LE Op. 1081, LE Op. 1117, LE Op. 1238, LE Op. 1246 and LE Op. 1318, have used the word “retainer” to describe a fee arrangement that is inconsistent with this opinion, they are overruled. *See generally*, L. Brickman and L. Cunningham, *Nonrefundable Retainers Revisited*, 72 NCL Rev. 1, 3-5 (1993).

3. **Advanced Legal Fees.** Fees paid in advance for particular legal services not yet performed are advanced legal fees regardless of the terminology used in the employment contract. Advanced legal fees are not violative of the Disciplinary Rules as long as they are properly deposited and identified as belonging to the client until earned. The Committee has consistently opined that the element of payment for future legal services differentiates advanced legal fees from a retainer. LE Op. 1322, LE Op. 1178. The two terms are not synonymous.

Because advanced legal fees do not belong to the lawyer until the services are rendered, it is the opinion of the Committee that they must be deposited in an identifiable account (trust account) and remain the property of the client until they are earned by the attorney. The Committee notes that in some situations, the employment contract may provide that a portion of an advanced legal fee is considered to be earned at the time it is paid. In this case the earned portion becomes the property of the lawyer and may not be deposited in the lawyer's trust account.

Upon termination of the representation it is the duty of the attorney to refund any portion of an advanced legal fee which has not been earned. In addition, all fees charged against the account must be reasonable and must be adequately explained to the client. DR:2-105(A).

4. **Non-refundable Legal Fees.** The Committee has previously opined and continues to be of the opinion that any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules and is thus improper. LE Op. 1322 and LE Op. 1370. If the fee is an advance payment for legal services, as described above, it continues to be the property of the client. The fee must be deposited in a trust account and may only be paid over to the lawyer when and if it is earned. An advanced legal fee cannot, by employment contract or otherwise, be termed non-refundable without violating the Disciplinary Rules. See LE Op. 510, LE Op. 1246 and LE Op. 1322. And, as noted above, using the term “retainer” to describe what is, in reality, an advanced legal fee does not change the true nature of the fee, nor does it allow the fee to be considered non-refundable. *See Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y. 1994).

The Committee believes that the concept of a non-refundable or minimum fee paid in advance for specific legal services is violative of the Disciplinary Rules for the following reasons:

A. A non-refundable fee compromises the client's unqualified right to terminate the attorney client relationship and is violative of DR:2-108(A)(3). *See also In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994). The client's absolute right to discharge a lawyer contained in DR:2-108(A)(3) would be of little value if the client must risk paying for services not rendered. Such a situation could force the client to continue the services of an attorney in whose integrity, judgment or capacity the client had lost confidence.

B. If the client discharges the lawyer prior to the fee being earned, the retention of a non-refundable fee would violate the attorney's responsibility to refund to a client any advanced fee that had not been earned. DR:2-108(D).

C. A fee that is not earned is per se an unreasonable fee. Thus the retention of an unearned non-refundable fee would result in the lawyer collecting an unreasonable fee in violation of DR:2-105(A).

5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a *quantum meruit* determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

6. Contingency Fees. The Committee notes that DR:2-105(C) permits fees that are contingent on the outcome of a matter for which the service is rendered, except in criminal cases or other matters in which such a fee is prohibited by law. Contingent fees are generally ethically permissible in any legal matter that generates a *res* from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. This Committee has previously opined, and continues to believe that ministerial matters that carry no such risk, such as recovering funds that could be obtained by the client without the services of the lawyer, are not matters in which a contingent fee arrangement is proper, nor do they create the type of *res* from which a contingency fee may be paid. It would, therefore be improper for a lawyer to receive a contingent fee to recover medical compensation payments which an insurance carrier is contractually obligated to pay to the client. LE Op. 1461

The Council of the Virginia State Bar has opined that, except in extremely rare situations, it is ethically improper for an attorney to enter into a contingent fee arrangement in family law and domestic relations cases. LE Op. 189. "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." EC:2-22. Thus it would be improper for an attorney to enter into a contingent fee agreement to represent a divorced spouse in a claim against her husband's military retirement pay.

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

LE Op. 568. It would similarly be improper to enter into a fee agreement where the attorney's fee would consist of a percentage of a lump sum property settlement. LE Op. 423.

This Committee has opined that only where the following four factors exist may a contingent fee agreement be employed in a domestic relations matter:

1. There has been the passage of a sufficient length of time so as to preclude the continued existence of any meaningful human relationship which might be undermined by litigation handled on a contingent fee basis;
2. The client is not able to pay reasonable attorney's fees charged on an hourly or fixed basis;
3. Any attorney's fees awarded by the court will be credited against the contingent fee; and
4. The contingent fee charged would be fair and reasonable under all the circumstances. LE Op. 189, LE Op. 405, LE Op. 423, LE Op. 588, LE Op. 667, LE Op. 850 and LE Op. 1062.

Contingency fee arrangements must state the method by which the fee is determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a closing statement showing the fee and the method of its determination.

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

Legal Ethics Committee Notes. – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.

Rule 1.5(e) permits fee sharing between lawyers in different firms provided the client consents and the fee is reasonable. The referring attorney may charge a fee for referring a case to another lawyer without further participation in the client's matter.