Don’t ‘Take The Money And Run’

by

by Robert I. Warner, Assistant Bar Counsel

After 5 years of working for a law firm, you decide to open your own practice. You’ve gotten your stationery, your cards and a sign that announces to the world that you are open for business. On the third day of your noble undertaking, a prospective client tells you that she was arrested a week ago and needs a lawyer. You quote her a fee of $7,500 and tell her that the fee is nonrefundable. She pays you - - and for the next three hours you listen to her misfortunes.

The next day, as you are leaving your office to deposit your client’s check at your bank, the client appears and tells you that she has decided to hire other counsel. That’s okay with you, but she wants her money back. You remind her that she agreed that your fee was nonrefundable. She demands the return of her money and tells you that if you don’t give her back the $7,500, she will report you to the bar counsel. Do you or don’t you ‘take the money and run’?

The short answer to this question is that you must return the unearned portion of the fee. The nonrefundable fee described in this scenario was not proper.

Courts and commentators disapprove of nonrefundable fees for two reasons. First, a nonrefundable fee may result in an unreasonably high or clearly excessive fee for the lawyer’s services. Lawyers should not charge unreasonable fees, and it is a disciplinary rule violation to charge a clearly excessive fee. Mass. R. Prof. C. 1.5(a) In this scenario, the lawyer would collect $7,500 for three hours of work - - a clearly excessive fee.

The second objection to nonrefundable fees is that they interfere with a client’s ability to fire the lawyer. See Mass. R. Prof. C. 1.16(a)(3) (a lawyer must withdraw if discharged by the client). It is obvious that most clients cannot afford to pay a steep nonrefundable fee to a succession of lawyers. Charging a nonrefundable fee has the effect of binding the client to the lawyer.

This point was made in Smith v. Binder, 20 Mass. App. Ct. 21 (1985), a case in which former clients sued for an accounting and damages against the attorneys who had collected a nonrefundable fee of $8,500 in a criminal matter from which they were discharged after three weeks. The Appeals Court observed that if the lawyers were permitted to keep the unearned portion of the fee, “the right to change lawyers would be of little value.” Id. at 23. See also Matter of Cooperman, 633 N.E. 2d 1069 (N.Y. Ct. App. 1994), holding that nonrefundable special retainers are unethical and unconscionable, and MBA Op. 95-2, advising that an attorney may not enter into a fee agreement with a client for a particular case or service if the agreement requires the client to pay a nonrefundable retainer, citing Cooperman.

Nonrefundable fees are generally permissible only when they qualify as a “classic” retainer binding the attorney to employment for ongoing services and to the exclusion of adverse parties. The retainer in these circumstances is seen as payment for the establishment of an
exclusive relationship to the advantage of the client that requires the lawyer to forego the possibility of employment by others. The classic retainer is “earned” when paid. Blair v. Colombian Fireproofing Co., 191 Mass. 333 (1906)

All this is not to say that lawyers may not charge a flat fee upfront for services. The point is that the fee may not be characterized as nonrefundable, and the lawyer is always obligated to return any unearned portion of the fee, if the representation terminates prior to the conclusion of the matter.

The final consideration is the account where the fee is deposited. Earned fees may not be deposited to or held in a client funds account. Mass. R. Prof. C. 1.15(a). Classic retainers are considered the lawyer’s funds, and may not be deposited in an account holding clients’ funds. However, an advance retainer for services to be performed must be deposited to an IOLTA or other interest-bearing client funds account (depending on the amount of the retainer and the expected time the retainer will be held). The funds belong to the client until they are earned; once the lawyer’s entitlement to the fee is “fixed,” the fee must be promptly withdrawn. Mass. R. Prof. C. 1.15(d)(2).

Flat fees occupy a middle ground and can either be deposited to a trust account and withdrawn as earned or deposited to a personal or operating account subject to refund where required.

Fee complaints are frequently made to bar counsel. Spelling out the fee and the services to be performed for it in writing will go a long way toward reducing disputes with clients and resolving those disputes that may arise.

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