

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL ETHICS**

**Formal Opinion 2015-2: NONREFUNDABLE MONTHLY FEE IN A RETAINER AGREEMENT**

**TOPIC:** Use of a flat, nonrefundable monthly fee in a retainer agreement.

**DIGEST:** Use of a flat, nonrefundable monthly fee in a retainer agreement raises a number of ethical issues, which must be considered carefully. Such a fee may be permissible in certain circumstances, provided it is not excessive, is fully earned, and does not impede the client’s right to terminate the representation. In addition, the retainer agreement must clearly disclose how the fee is calculated, what services are covered by the fee, and under what circumstances the fee becomes fully earned and, thus, nonrefundable.

**RULES:** 1.5 and 1.16

**QUESTION:** May a lawyer use a retainer agreement that provides for a flat, nonrefundable monthly fee?

**OPINION**

A New York lawyer is considering a retainer agreement, which would require the client to pay, at the start of each month, a flat monthly fee in exchange for access to the lawyer for a specified list of legal services (“Retainer Agreement”).<sup>1</sup> Each month the lawyer would send the client a bill specifying the time spent and services rendered by the lawyer during the prior month, and the amount of the bill for the prior month would be the flat fee. Any services outside the scope of the Retainer Agreement would be available for an additional fee to be specified under a separate fee agreement. The client would be permitted to terminate the Retainer Agreement at any time. However, the agreement would state that previously paid monthly fees are not refundable.

**I. Limitations on the Use of Nonrefundable Fees in New York**

New York lawyers are prohibited from entering into an arrangement for a “nonrefundable retainer fee.” Rule 1.5(d)(4) of the New York Rules of Professional Conduct (the “New York Rules” or “Rules”). A New York lawyer may, however, charge a “reasonable minimum fee” if the retainer agreement “defines in plain language and sets forth the circumstances under which the fee may be incurred and how it will be calculated.” *Id.* Here, the proposed monthly fee is a flat fee rather than a minimum fee; but, for the purpose of Rule 1.5(d), we believe this difference is immaterial and that a flat fee is ethically permissible if it satisfies the other requirements of Rule 1.5.

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<sup>1</sup> Our analysis applies generally to nonrefundable fees paid on a periodic basis, whether monthly or otherwise.

In general, fees paid to a lawyer in advance are nonrefundable only to the extent they have been earned by the lawyer. *See* Rule 1.16(e) (upon termination of representation, a lawyer shall promptly refund any part of a fee paid in advance that has not been earned). For example, a fee that is paid solely to secure a lawyer’s availability for future engagements and is not intended to compensate the lawyer for legal services to be rendered on a particular matter would generally be earned upon payment. This type of fee – sometimes called a “general retainer” – is earned whether or not the lawyer performs any legal services, provided the arrangement is clearly explained to the client. *See Agusta & Ross v. Trancamp Contracting Corp.*, 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) (general retainer compensates a lawyer for “agree[ing] implicitly to turn down other work opportunities that might interfere with his ability to perform the retainer-client’s needs” and “giv[ing] up the right to be retained by a host of clients whose interests might conflict with those of the retainer-client”); *see also Kelly v. MD Buyline, Inc.*, 2 F. Supp. 2d 420, 426 (S.D.N.Y. 1998).

Alternatively, a fee paid in advance for legal services to be performed on specific, identified matters – sometimes called a “special retainer” – is not earned unless the services are performed. *See Kelly*, 2 F. Supp. 2d at 426 (S.D.N.Y. 1998) (discussing distinction between general and special retainer agreements). This type of fee remains subject to refund if the lawyer fails to provide the agreed services. *Id.* In addition, the New York Court of Appeals has held that nonrefundability provisions in special retainer agreements, by allowing the lawyer to keep fees that have been paid in advance but have not been earned, violate public policy because they impede a client’s absolute right to terminate the attorney-client relationship. *See In re Cooperman*, 83 N.Y.2d 465 (1994); N.Y. City Bar Ass’n Formal Ethics Opinion (“NYCBA Formal Op.”) 1996-5 (May 31, 1996) (retainer providing for forfeiture of an initiation fee and monthly fee in their entirety upon termination would violate *Cooperman*).

A third kind of fee – sometimes called a “hybrid retainer” – combines elements of a general retainer and a special retainer. This type of fee may be paid in advance both to secure a lawyer’s availability for future services, if requested, and to engage the lawyer to actually provide specific, identified services. While there may be circumstances in which a hybrid retainer, or at least some portion of it, might reasonably be treated as a general retainer and thus nonrefundable, courts and commentators have expressed concern about these arrangements, warning that they should be carefully analyzed to determine whether the fee is being paid to secure the lawyer’s availability or to pay for specific services. *See Agusta*, 193 Misc.2d at 787 (enforcement of a hybrid retainer “should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability”). A fee for services is subject to refund if the services are not rendered.

Here, the proposed monthly fee could be viewed as compensating the lawyer both for availability and for specific services. On one hand, the monthly fee would compensate the lawyer for making himself available to the client during the month, whether or not the client requests any services. In this context, one might view the fee as earned when paid. On the other hand, the lawyer is committing to provide specific services during the month upon the client’s request; if such a request is made, the fee compensates the lawyer for providing the requested services. Thus, the monthly fee could also be viewed as an amount paid in advance for specific services, which would not be earned unless the services, if requested, are performed. Thus, to

determine whether the nonrefundable monthly fee is ethically permissible, it must be analyzed as a hybrid retainer, which combines aspects of both a general and a special retainer.

## **II. Factors to Consider When Analyzing a Nonrefundable Monthly Fee**

The Committee is not prepared to say that charging a nonrefundable monthly fee is impermissible in all circumstances, as we realize there may be potential benefits to a client in having such an arrangement.<sup>2</sup> In light of Rule 1.5(d)'s prohibition against nonrefundable retainers, however, such an arrangement raises significant concerns and should be analyzed carefully. Treating the monthly fee as nonrefundable raises four key questions. First, is the fee "excessive," under Rule 1.5(a)? Second, is the fee fully earned and, therefore, nonrefundable? Third, does the fee impede the client's right to terminate the representation? Fourth, is the fee adequately disclosed? We discuss each of these factors in connection with the proposed nonrefundable monthly fee.

### **A. Is the Fee "Excessive" Under Rule 1.5(a)?**

In deciding whether to charge a nonrefundable monthly fee, the lawyer must determine whether the amount of the fee would be "excessive" under the relevant circumstances. Rule 1.5(a) lists some of the factors to be considered in determining whether a fee is excessive, such as:

- The time and labor required, the novelty and difficulty of the work, and the skill required to perform the services;
- The likelihood that acceptance of the employment will preclude other employment by the lawyer;
- The fee customarily charged in the locality for similar work;
- The amount involved and results obtained;
- The time limitations imposed by the client or by circumstances;
- The nature and length of the professional relationship with the client;
- The experience, reputation and ability of the lawyer;
- Whether the fee is fixed or contingent.

A monthly fee is not excessive solely because it involves a minimum or flat amount. Given the number of variables involved, however, the Committee cannot opine on whether a particular monthly fee is excessive. In applying these factors, the lawyer should consider whether the fee will be appropriate in each of the following scenarios: (1) if the client does not request any specific services to be performed in a particular month (and is, thus, paying only for the lawyer's availability); (2) if the client requests and receives specific services in a particular

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<sup>2</sup> For example, a client who thinks she may need legal services of a specified type at some time in the future, but does not know when or to what extent, may welcome an opportunity to pay a modest monthly fee to secure the availability of counsel with the understanding that no additional fees will be payable if and when those services are needed. Even in this situation, however, the fee must not operate as a financial disincentive for the client to terminate the lawyer-client relationship.

month (and is, thus, paying both for the lawyer to be available and to perform services); and (3) if the client requests specific services, but the lawyer fails to provide those services. As discussed below, this third scenario is most problematic, because it likely constitutes an impermissible nonrefundable retainer. *See infra*, II. B. (discussing when a fee becomes “fully earned” and, thus, nonrefundable).

### **B. Is the Fee Fully Earned?**

Assuming the monthly fee is not “excessive,” *supra* at II. A., then it will be fully earned, so long as either: (1) the client has not requested any services from the lawyer during the month; or (2) the lawyer has provided any services requested by the client that month, which fall within the scope of the Retainer Agreement. The lawyer must consider, however, what happens if the client requests services in a particular month, which the lawyer fails to provide. In order for the entire fee to be nonrefundable under those circumstances, one would have to conclude that the lawyer was agreeing to charge *only* for availability and was agreeing to provide the specified services free of charge, so that the client would not be entitled to a refund even if the lawyer fails to provide the services. We think such a position would be difficult for the lawyer to sustain, particularly since the lawyer’s failure to provide requested services might indicate a lack of availability.

One way to address this concern is to agree that the monthly fee is nonrefundable only if: (1) no services are requested during the month; or (2) the lawyer performs any services requested during the month. If, on the other hand, the client requests services that the lawyer fails to perform, then the monthly fee would fully or partially be refundable. Alternatively, the lawyer could allocate a portion of the monthly fee to availability and a portion to services requested by the client, and agree that only the former portion is nonrefundable. Whether this approach works would depend in part on the reasonableness of the allocation, in light of the factors to be considered in assessing whether a fee is excessive. *See supra*, at II.A. The Retainer Agreement should explain the basis for making any portion of the monthly fee nonrefundable (for example, because the nonrefundable portion is payable solely to secure the lawyer’s availability, whether or not any services are requested).

The lawyer must also consider what happens if the client decides to terminate the representation during the month. If the monthly fee were only to secure the lawyer’s availability, then the fee is earned upon receipt and would be nonrefundable. As noted above, however, we believe this position would be difficult to sustain, given the hybrid nature of the retainer. One way to minimize this concern is to make the monthly fee refundable, in whole or in part, depending on when during a given month the client terminates the representation. For example, a larger portion of the fee may be refundable if the client terminates the representation early in the month or before any services have been performed. The Retainer Agreement should state whether any portion of the fee is refundable in the event of termination and, if so, how the amount is to be calculated. As with any fee, whatever amount is retained by the attorney upon termination must not be excessive within the meaning of Rule 1.5(a), must be fully earned, and must not impede the client’s termination right.

### **C. Does the Fee Impede the Client's Termination Right?**

A nonrefundable monthly fee must not operate as a disincentive for the client to terminate the representation. Thus, in setting the amount of the monthly fee, the lawyer must consider whether it will create a meaningful financial disincentive for the client to terminate his or her relationship with the lawyer. This determination will depend, among other things, on the amount of the fee and the client's financial circumstances and expectations. It may be difficult to address this concern in a generic way, using a standard arrangement that applies to all clients regardless of their different circumstances. Certainly, the higher the fee, the greater the risk that it will impede the client's termination right.

### **D. Is the Fee Adequately Disclosed in the Retainer Agreement?**

Rule 1.5(b) requires a lawyer to "communicate to a client . . . the basis or rate of the fee and expenses for which the client will be responsible." In addition, Rule 1.5(d)(4) permits a lawyer to charge a "reasonable minimum fee" if the retainer agreement "defines in plain language and sets forth the circumstances under which the fee may be incurred and how it will be calculated." Here, the Retainer Agreement should explain clearly which services are included in the monthly fee, if requested by the client. It should also explain why and to what extent the monthly fee is nonrefundable. For example, the Retainer Agreement should explain what portion of the fee is being charged to secure the lawyer's availability, as opposed to compensating him for specific legal services, what portion of the fee is earned when paid (and thus nonrefundable), and what portion – if any – is refundable if the client terminates the representation during the month. The retainer agreement must avoid any suggestion that the monthly fee is nonrefundable without being earned. Overly broad statements about non-refundability can mislead clients about their right to receive a refund of fees that have not been earned or their right not to be charged excessive fees.

## **CONCLUSION**

Use of a flat, nonrefundable monthly fee in a Retainer Agreement raises a number of ethical issues, which must be considered carefully. Such a fee may be permissible in certain circumstances, provided it is not excessive, is fully earned, and does not impede the client's right to terminate the representation. In addition, the Retainer Agreement must clearly disclose how the fee is calculated, what services are covered by the fee, and under what circumstances the fee becomes fully earned and, thus, nonrefundable.