

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 15
August 20, 1993**

QUESTION - Are non-refundable retainer agreements ethical in domestic relations and criminal cases?

ANSWER - While non-refundable retainer agreements are not specifically prohibited in Nevada Supreme Court Rule 155, any such agreement would be unethical if, considering all the surrounding circumstances, the fee would be considered unreasonable.¹

AUTHORITIES RELIED ON

Nevada Rule of Professional Conduct (Supreme Court Rule) 155.

DISCUSSION

Nevada Supreme Court Rule 155 reads in pertinent part as follows:

A lawyer's fee should be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (c) The fee customarily charged in the locality for similar legal services;
- (d) The amount involved and the results obtained;
- (e) The time limitations imposed by the client or by the circumstances;
- (f) The nature and length of the professional relationship with the client;
- (g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (h) Whether the fee is fixed or contingent.

When Nevada Supreme Court Rule 155 governing the determination of the reasonableness of an attorney's fee was adopted, the threshold standard of "clearly excessive" was eliminated from the prior rule thus prohibiting as unethical both unreasonable as well as patently unconscionable fees. ²

The Committee on Professional Ethics of the Association of the Bar of the City of New York has concluded that a lawyer may not characterize a fee as non-refundable or otherwise suggest that any fee paid before services rendered is not subject to refund or adjustment. What is acceptable are minimum fees paid in advance, flat fees for contemplated services, or retainers reserving the availability of a lawyer for a certain period of time. However, unearned fees, resulting either from withdrawal or discharge of the lawyer, must be refunded. NYC 1991-03.

The Tennessee Board of Professional Responsibility has likewise concluded that fees that may have appeared reasonable at the outset of a case may have appeared reasonable at the outset of a case may result in the unjust enrichment of the lawyer based upon changed circumstances. A refusal to adjust fees accordingly resulted in censure of the attorney. In *Re Quillen*, Lawyers Manual of Professional Conduct 574 (Tenn. Bd. Of Prof. Resp. 1984), see also, *Terzis v. Estate of Whalen* 489 F2d 608 (NH 1985).

The ABA Ethical Considerations formulated pursuant to DR 2-106, the predecessor to Nevada Supreme Court Rule 155, required a lawyer to refund unearned fees if that lawyer is discharged or withdraws from representation.

The argument in support of enforcing non-refundable retainers is that an attorney should be free to contract for such a fee based upon his skill or reputation, the difficulty of the issues, the lack of desirability of the case or the time requirements of the case. We agree that all of these factors are consistent with Nevada Supreme Court Rule 155, but they do not overcome the ultimate requirement to gauge the reasonableness of a disputed fee against the factors listed in the rule, such as the results obtained, the time expended, and the uniqueness of the case. Nevada Supreme Court Rule 155 would be meaningless if an attorney could defend a disputed fee simply on the basis that the client made a contract and the result and efforts expended are irrelevant. Indeed, a non-refundable retainer agreement may have the inappropriate effect of suggesting to the client that there can be no challenge to such a fee agreement in the event that the attorney is discharged or withdraws .³

Even if an attorney were to call a non-refundable retainer a minimum fee or a fixed fee, the analysis would be no different. The contemplated fee must be reasonable, and if the attorney is discharged or withdraws, the attorney cannot keep any amount of a fee which cannot be justified based upon a time expended and results obtained analysis. If the attorney is particularly experienced in the matter or enjoys an enhanced reputation, this may certainly be reflected in an hourly rate. Likewise a demonstrable lost opportunity for taking the client may also be reflected. SCR 155. But absent such unique factors, the committee views a non-refundable retainer agreement as an oxymoron; because if a retainer is not earned, and thus cannot be considered reasonable under the circumstances, it cannot be re-fundable.

CONCLUSION

Non-refundable retainer agreements, while not specifically prohibited, should be reviewed with caution, as they do not relieve an attorney from the burden of considering and utilizing all the factors listed in SCR 155 in initially setting a fee, and justifying the reasonableness of the fee ultimately charged on those same factors.

1 The question posed to this committee contained a written fee agreement which appeared to charge the bulk of the anticipated total fee in advance of service for a divorce proceeding. The lawyer was discharged after six hours of work, but insisted that his contract for keeping the entire \$7,500 was enforceable. The fee agreement contemplated that the retainer would be earned because of the complexity of the case even if the matter were resolved by "reconciliation; settlement, judgment or dismissal ...". Ironically, discharge of the attorney was not foreseen as an event contemplated by the parties as justifying the non-refundable nature of the retainer.

2 Nevada Supreme Court Rule 155 is based upon the ABA Model Rule 1.5. The courts uniformly use the ABA Model Rules in deciding whether a fee charged by an attorney is enforceable. Hensley v. Ekerhart, 461, U.S. 424 (1982), In re National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (CA D.C. 1982), Johnson v. Georgia Highway Express, 488 F.2d 714 (CA 1974). The courts place the burden on the attorney to demonstrate the reasonableness of a fee based largely upon the results, obtained and time expended. (Although time is of relative importance; otherwise inefficiency may be rewarded. Blank v. Talley Industries, Inc., 390 F.Supp 1 (SDNY 1975).)

3 See 57 Fordham Law Review 149, 1988-89, Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.