
**E-86-9 Retainers and advanced fees and costs:
Trust accounts and ethical responsibility**

Questions

What are a lawyer's ethical responsibilities when requesting and receiving:

1. A flat fee retainer?
2. An advance toward fees, costs and expenses to be determined and services to be performed?

Opinions

1. Retainers. This committee defines the term "retainer" as fees paid to "secure a lawyer's general availability to a client and (not as payment for) a particular representation. . . ." ABA/BNA *Lawyers' Manual on Professional Conduct*, section 45:104 [hereinafter cited as *Lawyers' Manual*]. However, as pointed out in the Florida Bar Committee on Ethics Opinion 76-27 (1976), reported at, O. Maru, *Digest of the Bar Association Ethics Opinions* (1970 and Supps. 1970, 1975, 1980) at 10867, the term "retainer" no longer otherwise has a definite or uniformly accepted meaning. As the Florida opinion further points out, its meaning has derived largely from the specifics of individual lawyer-client agreements.

With this definitional problem clarified, this committee concurs with the majority view that a retainer should not be deposited in a trust funds account (i.e., an account required by SCR 11.05 and SCR 20.50) when there exists a clear agreement (preferably in writing) between lawyer and client designating the funds as the lawyer's upon receipt. See, e.g., *Lawyers' Manual, supra*, citing, among other authorities for the majority view *Baronowski v. State Bar*, 24 Cal. 3d 153 164 n. 4, 593 P.2d 613, 618 n. 4 (1979). Regarding the importance of clear agreements with clients in handling funds received from them, see generally *In re Disciplinary Proceedings Against Marine*, 82 Wis. 2d 602, 610, 264 N.W.2d 285 (1978). Deposit of a retainer in a client trust account would be in violation of SCR 11.05(1) and SCR 20.50(1), prohibiting the commingling of

lawyer and client funds, since a retainer, by definition, is a lawyer's property upon receipt.

However, having acknowledged that retainer fees may, by agreement, be put to the receiving lawyer's own use upon receipt, we hasten to caution that any "non-refundability" provision is not without qualification, for example:

a. The prohibitions against unreasonable, excessive and illegal fees. *See SCR 20.12 and Herro, McAndrews & Porter, S.C. v. Gerhardt*, 62 Wis. 2d 179, 182, 214 N.W.2d 401 (1974).

b. The inherent power and responsibility of Wisconsin courts to determine and enforce the reasonableness of lawyers' fees. *See Herro, supra*, at 183.

c. The voidable nature of contracts for legal services obtained or made in violation of Wisconsin Supreme Court Rules. *See SCR 11.01*.

d. A lawyer's discharge under the retainer agreement for cause. *See, e.g., Annot.*, 88 A.L.R.3d 246, 252 (1978). And,

e. Ambiguity in retainer agreement regarding non-refundability. *See, e.g., Jacobson v. Sassower*, 66 N.Y.2d 991, 489 N.E.2d 1283 (1985).

2. Advances. The committee defines the term "advance(s)" as referring to funds paid by a client to a lawyer with respect to *specific* services to be undertaken (e.g., bankruptcy or divorce representation), whereas the term "retainer" refers to the securing of a lawyer's *general* or standby availability to a client. *See Opinion (1) above*.

Under this definition of advance(s), the committee concurs with the prevailing majority view requiring deposit of fee advances in client trust accounts until earned. *See Lawyer's Manual* at section 45:104-105. *See also SCR 20.50(1)(b) and (2)(d)*; and *Marine, supra*, regarding the necessity of clear agreements relating to timing and right of withdrawal, rendering *written* agreements on these matters highly advisable if not necessary.

Concerning advances for costs and expenses projected to be incurred in providing future representation, the committee would point out that effective Jan. 1, 1987, the exception for deposit of "advances for costs and expenses" in client trust accounts will be deleted. *See In re Amendment of SCR 20.50 Order* (Wis. Sup. Ct. 3/21/86), *reported at* 59 Wis. Bar Bull. 26 (May 1986). This exception does not exist in the *ABA Model Rules of Professional Conduct* either. *See ABA*

Model Rule 1.15(a) and Comment. Because under either the current or 1987 version of SCR 20.50(1) advances of projected costs and expenses have nothing to do with a lawyer's compensation for professional services, the committee concludes that such advances remain the property of the client until their disbursement from a client trust account is required to either reimburse the lawyer or to pay the costs and expenses directly from the trust account.

Caveat: The committee expresses no opinion on the potential tax consequences relating to a lawyer's observance of this opinion. And, deeming this to be a significant opinion because it addresses commonly encountered but judicially unresolved dilemmas for Wisconsin lawyers, the committee wishes to underscore the advisory and non-binding nature of this and all State Bar Ethics Opinions and to urge lawyers to thoughtfully consider the authority cited herein in support of the committee's conclusions as well as authority which may differ in some respects. *See, e.g.*, New York State Bar Committee on Professional Ethics, Op. 570 (6/7/85), reported at *Lawyers' Manual*, section 801:6113; and Hawaii Supreme Court Disciplinary Board, Formal Op. 29 (12/18/85), reported at *Lawyers' Manual*, section 801:2802.