

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 96-4

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SYLLABUS: It is proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter. The flat fee agreement must comport with the Ohio Code of Professional Responsibility. Under DR 2-106(A), the flat fee must not be excessive. Under DR 5-103(B), the client must remain ultimately liable for expenses of litigation. Under DR 6-101 and DR 7-101, the flat fee agreement must not interfere with an attorney's duties of competent and zealous representation to each client. Under DR 9-102, a flat fee paid in advance of representation may be deposited into the lawyer's business account upon receipt pursuant to the agreement between the lawyer and client that the flat fee will be paid in advance of the representation. Under DR 2-106(A) and DR 2-110(A)(3), a flat fee paid in advance of representation in a legal matter should not be deemed nonrefundable.

OPINION: This opinion addresses a flat fee agreement requiring a client's payment of a fixed amount in advance of representation in a criminal matter. It does not address payment of a retainer to an attorney to secure availability of the lawyer's services over a period of time without regard to a specific matter.

Is it proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter?

Fee agreements must comply with DR 2-106 of the Ohio Code of Professional Responsibility.

DR 2-106. Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitation imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Fixed fees are expressly recognized as a type of legal fee in DR 2-106(B)(8). Fixed fee agreements are required in criminal representations, since contingent fees in criminal cases are prohibited under DR 2-106(C).

A flat fee is a type of fixed fee. Flat fees are based upon factors independent of the actual number of hours involved in a representation. Flat fees provide certainty to clients with regard to costs of legal services while allowing attorneys to be paid a fair sum for their services. Flat fees are used for routine and standardized services, but are increasingly being used in representations that present uncertainties about the amount of time the lawyer will expend. *See* ABA/BNA Lawyer's Manual on Professional Conduct, 41:306 (2/23/94).

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. However, time is but one factor to consider when determining the reasonableness of a fee under DR 2-106(B). *See e.g.*, ABA, Informal Op. 1389 (1977) permitting the use of a fixed fee in advance for legal work on tax matters or litigation before the Tax Court when the fixed fee embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted.

This Board has addressed the use of flat fees, but in the context of a flat fee agreement between a law firm and an insurer/third party administrator of group health benefit plans. In Opinion 95-2 (1995), the Board advised that the propriety of a flat fee agreement is based upon a variety of factors. A fixed flat fee is subject to the restriction in DR 2-106(A) that it not be excessive. A fixed flat fee cannot circumvent the requirement of DR 5-103(B) that clients must remain liable for expenses of litigation. A fixed flat fee agreement must not limit an attorney's duties of competent and zealous representation to each client under DR 6-101 and DR 7-101. *See* Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 95-2 (1995).

When the payment of a flat fee is in advance of representation, there are additional ethical considerations. Should a flat fee be placed into the attorney's business account or should it be deposited into a client trust account? May the fee be nonrefundable?

DR 9-102(A) requires that the identity of all client funds paid to a lawyer or a law firm be preserved by deposit into an identifiable bank account,

separate from an account for deposits of the lawyer's or law firm's funds. Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein as required under DR 9-102(A)(2). These restraints are for the protection of clients.

**DR 9-102. PRESERVING IDENTITY OF FUNDS AND
PROPERTY OF CLIENT**

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

In this Board's view, DR 9-102(A) does not require that flat fees paid in advance for representation in a criminal matter be placed in a trust account. A flat fee for representation in a matter may be placed into the attorney's business account upon receipt, based upon the agreement between the lawyer and client that the flat fee will be paid in advance of representation. By agreement, the funds are given to the lawyer in exchange for the promise to represent the client in the matter. However, deposit into a business account does not mean that the fee is nonrefundable.

A flat fee paid in advance for representation in a legal matter should not be deemed nonrefundable. Nonrefundable fees paid in advance of representation allow attorneys to keep unearned fees for which a client receives little or no benefit. Nonrefundable advance fees are a problem when there is discharge of a lawyer by a client or when a lawyer withdraws from a case. *See Cincinnati Bar Ass'n v. Schultz*, 71 Ohio St. 3d 383, 384 (1994).

Ethics committees in Ohio disapprove of nonrefundable fee agreements. *See Ohio State Bar Ass'n, Informal Op. 90-8 (1990); Columbus Bar Ass'n, Op. 5 (1988); Bar Ass'n of Greater Cleveland, Op. 84-1 (1984). But cf. Toledo Bar Ass'n, Op. 93-8 (1993) advising that nonrefundability is improper or proper depending upon the fact situation.*

Ethics committees in other states have found disfavor with nonrefundable fee contracts in criminal defense representations. *See Kansas Bar Ass'n, Op. 84-12 (1984), North Carolina State Bar Ass'n, Op. 106 (1991), Virginia State Bar, Op. 646 (1985).* In New York, the state's highest court has held that nonrefundable retainers clash with public policy and contravene the Code of Professional Responsibility. *See In re Cooperman*, 83 N.Y. 2d 465, 633 N. E. 2d 1069, 611 N.Y.S. 2d 465 (1994), *aff'g* 591 N.Y.S. 2d 855 (A.D. 2 Dept. 1993). Among the bar, the issue of nonrefundability attracts attention. *See Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. Cin. L. Rev. 11 (Fall 1995); Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers*, 73 N.C.L. Rev. 271 (Nov. 1994); Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C.L. Rev. 1 (Nov. 1993).

Nonrefundable advance fees contradict the requirement of DR 2-110(A)(3) that “[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.” A nonrefundable advance fee agreement unfairly penalizes a client who discharges a lawyer.

In conclusion, it is proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter. The flat fee agreement must comport with the Ohio Code

of Professional Responsibility. Under DR 2-106(A), the flat fee must not be excessive. Under DR 5-103(B), the client must remain ultimately liable for expenses of litigation. Under DR 6-101 and DR 7-101, the flat fee agreement must not interfere with an attorney's duties of competent and zealous representation to each client. Under DR 9-102, a flat fee paid in advance of representation may be deposited into the lawyer's business account upon receipt pursuant to the agreement between the lawyer and client that the flat fee will be paid in advance of the representation. Under DR 2-106(A) and DR 2-110(A)(3), a flat fee paid in advance of representation in a legal matter should not be deemed nonrefundable.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.